APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

National Organization for Women, Inc., on behalf of itself and its women members and all other women who use or may use the services of women's health centers that provide abortions, and Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and the class of all women's health centers in the United States at which abortions are performed, Plaintiffs-Appellees,

v.

Joseph M. Scheidler, Pro-Life Action League, Inc., Andrew D. Scholberg, Timothy Murphy, and Operation Rescue, Defendants-Appellants.

September 14, 2000, Argued

October 2, 2001, Decided

Before Rovner, Diane P. Wood, and Evans, Circuit Judges.

Diane P. Wood, *Circuit Judge*. This case is in its fifteenth year of contentious litigation. The defendants are anti-abortion activists who employ a protest tactic they call "rescues," in which they and other activists physically block access to

abortion clinics so that the patients and staff cannot get in or out of the buildings. Plaintiffs use words less benign than "rescue" to describe the defendants' activities. We will refer to them as "protest missions," in the hopes that this will be understood as a neutral term. The defendants' goal is frankly to prevent abortions from taking place. Participants in the protest missions engage in a substantial amount of protected speech, including efforts to persuade clinic patients not to have abortions and to persuade clinic doctors and staff to quit performing abortions. Unfortunately, the protest missions also involve illegal conduct: protesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more egregious conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

The plaintiffs, the National Organization for Women (NOW) and two clinics that were the targets of protest missions, brought this class action alleging, among other things, that the defendants' conduct amounted to a pattern of extortion which violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). The trial judge certified two classes: one, represented by NOW, of all NOW members and non-members who have used or would use the services of an abortion clinic in the United States, and a second of all such clinics. After a trip through this court to the Supreme Court of the United States during which many of the legal issues in the

case were clarified or resolved, the case was remanded to the district court for trial of the plaintiffs' RICO claims. A jury found for the plaintiffs and awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants have appealed a wide range of issues relating to the conduct of the trial and the issuance of the injunction. We find that the district court navigated its way through this complex and difficult case with care and sensitivity and affirm its judgment in all respects.

I

Many of the facts pertinent to this opinion are set out in the Supreme Court's decision remanding the case, *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (NOW I), and in our earlier decision in the case, *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), and we will not recount them in detail here. Nonetheless, in order to put the defendants' appeal in context, a brief overview of the facts presented at trial and of the procedural history of the case may be helpful.

The individual defendants, Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are on the Board of Directors of one of the corporate defendants, the Pro-Life Action League (PLAL). The other corporate defendant is Operation Rescue. (Randall Terry, the director of Operation Rescue, was also originally a defendant in the case, but he has since settled with the plaintiffs). All of the defendants were among the organizers of the Pro-Life Action Network (PLAN), which is a loose

national organization of groups that engage in protest missions and other aggressive anti-abortion tactics. Beginning in the mid-1980's, PLAN held annual conventions, organized in part by the defendants here, which included seminars on protest strategies. Those conventions concluded with protest missions being staged in the convention city. PLAN also sent a newsletter to its members and coordinated a hotline that potential protesters could call to get information about upcoming missions. The plaintiffs alleged, and at trial the jury found, that PLAN was an "organization or enterprise" for purposes of RICO liability.

Initially, the plaintiffs alleged that the defendants' tactics violated both RICO and federal antitrust law. In 1992, however, this court issued an opinion dismissing both theories of liability, reasoning that the antitrust laws were not applicable because the plaintiffs had not alleged that the defendants exercised any form of market control over the supply of abortion services and that RICO did not reach the defendants' conduct because the plaintiffs had not shown that the alleged racketeering acts were "economically motivated." 968 F.2d at 617-30. The Supreme Court granted certiorari on the limited question whether RICO requires proof that either the racketeering enterprise or the alleged predicate acts were motivated by an economic purpose. (The antitrust holding of our 1992 decision was thus left undisturbed.) The Court concluded that RICO contains no such economic motive requirement and therefore reversed our decision on that point. 510 U.S. at 256-62. Thereafter, we remanded the case to the district court for trial of the plaintiffs' RICO claims.

During the course of the seven-week trial, the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. The alleged predicate acts included violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), state extortion law, the federal Travel Act, 18 U.S.C. § 1952, and conspiracy to violate these laws. A few of the more egregious acts the plaintiffs alleged included:

- At a protest mission in Chico, California, protesters pressed four clinic staff members up against a glass entranceway to the clinic for several hours and refused to let them go even when they complained they were being crushed. The glass wall eventually either loosened or shattered, injuring a clinic staffer.

- At a similar mission in Los Angeles, protesters grabbed at a patient's arms and legs and tried to restrain her physically from entering the clinic. The patient was actually at the clinic for a follow-up to ovarian surgery, and the attack by the protesters reopened her incisions. As a result of the attack, the patient had to be rushed to the hospital.

- In several instances, protesters entered clinics and destroyed medical equipment.

- In several cases, protesters not only blocked doorways with their bodies, but chained themselves to the doorways of clinics, or, in some cases, to operating tables inside clinics.

- In December 1985, defendant Scheidler sent letters to every abortion provider in the Chicago area calling for a "Christmas Truce." In these letters, he requested that the clinics shut down for a specific day in December, stated that he would "call to confirm" the clinic's decision, and warned that non-complying clinics would be subjected to "non-violent direct action," a catch-phrase PLAN and PLAL frequently used for their activities.

Based on this and other evidence in the voluminous record that was created at the trial, the jury found in response to special interrogatories that the defendants or others associated with PLAN committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 acts of conspiracy to violate federal or state extortion law, four acts or threats of physical violence, 23 violations of the Travel Act, and 23 attempts to commit one of these crimes. The jury awarded damages to both clinics; once the damages were trebled, as RICO requires, the awards totaled over $163,000 to Summit Women's Health Organization and over $94,000 to Delaware Women's Health Organization.

After the jury returned its verdict, the district court held three days of additional hearings and then entered a permanent, nationwide injunction prohibiting the defendants or those acting in concert with them from interfering with the rights of the class clinics to provide abortion services, or with rights of the class women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying

clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.

II

Initially, we must consider the defendants' contention that RICO does not permit private plaintiffs to seek injunctive relief. The only court of appeals to have addressed this issue directly, the Ninth Circuit, concluded in 1986 that private plaintiffs cannot seek injunctions under RICO, relying largely on the court's reading of the statute's legislative history. See *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The other courts of appeals that have addressed the point in *dicta* are split. Compare *Johnson v. Collins Ent'mt. Co.*, 199 F.3d 710, 726 (4th Cir. 1999), *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988), and *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28-29 (2d Cir. 1983) (expressing doubt about availability of injunctive relief for private plaintiffs), with *Bennett v. Berg*, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring) (suggesting injunctive relief is available); see also *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990), *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion on resolution). Our study of Supreme Court decisions since the 1986 *Wollersheim* opinion convinces us that the approach of the Ninth Circuit (which relied almost exclusively on the legislative history of RICO to reach its result, as opposed to the actual language of the statute) no longer conforms to the Court's present jurisprudence, assuming for the sake of argument that it was a permissible one at the time. We are persuaded instead that the text of the RICO

statute, understood in the proper light, itself authorizes private parties to seek injunctive relief.

In interpreting the remedial provisions of the RICO statute, our inquiry begins with the statute's text, and, if the text is unambiguous, it ends there as well. See *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 1520-21 & n.7 (2001); *NOW I*, 510 U.S. at 261. RICO's civil remedies section provides, in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities . . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, . . . or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964.

Both parties have offered interpretations of this text that support their positions. The plaintiffs read the statute in a straightforward manner. Section 1964(a), they contend, grants the district courts jurisdiction to hear RICO claims and also sets out general remedies, including injunctive relief, that all plaintiffs authorized to bring suit may seek. Section 1964(b) makes it clear that the statute is to be publicly enforced by the Attorney General and it specifies additional remedies, all in the nature of interim relief, that the government may seek. Section 1964(c) similarly adds to the scope of § 1964(a), but this time for private plaintiffs. Those private plaintiffs who have been injured in their business or property by reason of a RICO violation are given a right to sue for treble damages. As the plaintiffs note, this reading of the statute gives the words their natural meaning and gives effect to every provision in the statute.

The defendants argue for a less intuitive interpretation. Relying on *Wollersheim,* they argue that § 1964(a) is purely a jurisdictional provision authorizing the district court to hear RICO claims and to grant injunctions to parties authorized by other provisions of the law to seek that form of relief. Section 1964(b), in the defendants' view, allows the Attorney General to institute RICO proceedings and authorizes the government to seek not only the relief described in that subsection, but also the relief described in § 1964(a). Section 1964(c) then provides a limited right of action for private parties. They read the two clauses of § 1964(c), however, as tightly linked provisions, under which private plaintiffs may sue *only* for monetary damages. The mention of this type of relief in the second clause

must mean, the defendants argue, that by implication no other remedies, particularly injunctive remedies, are available. We cannot agree that this is a reasonable reading of the statute.

As an initial matter, we note that the *Wollersheim* decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly "permits *the government* to bring actions for equitable relief." *Wollersheim*, 796 F.2d at 1082. Section 1964(b) does allow the government to seek equitable relief, but it specifically mentions only *interim* remedies. Although no one doubts that permanent injunctions are also available to the government, the government's ability to seek permanent, as opposed to interim, equitable remedies comes from the general grant of authority for district courts to enter injunctions found in § 1964(a), not from anything in § 1964(b). (The sentence "the Attorney General may institute proceedings under this section" is in that respect the equivalent of the first clause in § 1964(c), which says "any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . . ." Neither one addresses what remedy the plaintiff may seek.) Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a), we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c).

In addition, we cannot agree with the defendants' contention that § 1964(a) is a purely "jurisdictional" statute, despite the Ninth Circuit's characterization of it in that way in

Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303, 1307 (9th Cir. 1992) (construing *Wollersheim* holding as jurisdictional). What § 1964(a) does is to grant district courts authority to hear RICO claims and then to spell out a non-exclusive list of the remedies district courts are empowered to provide in such cases. In that sense, § 1964(a) is strikingly similar to the statute the Supreme Court construed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998). The statute at issue in *Steel Co.* provided that "the district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.*, quoting 42 U.S.C. § 11046(c). Noting that "'jurisdiction' . . . is a word of many, too many, meanings," the Court held that it would be "unreasonable to read [the statute] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, viz., to enforce the violated requirement and to impose civil penalties." *Id.* This part of the *Steel Co.* holding supersedes any rationale to the contrary that the courts of appeals may have followed in earlier years. We find that it is applicable to RICO and that § 1964(a) both confers jurisdiction on the district courts and specifies certain remedial powers that the courts will have in cases brought before them.

Once we accept that § 1964(a) is not purely jurisdictional, but also describes remedies available under RICO, the defendants' position becomes untenable. In the defendants' view, despite the general provisions for equitable relief in § 1964(a), injunctive relief is not available to any particular plaintiff unless it is also provided by some other section of the

statute. This reading renders § 1964(a)'s provision for injunctive relief a nullity. Because an alternative reading exists which gives meaning to every section of the statute, see *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("courts should disfavor interpretations of statutes that render language superfluous"), we reject the defendants' approach.

The defendants' final textual argument springs from the maxim that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). While we have no doubt that this is good advice as a general matter, we do not find it particularly helpful in this case. This is not a situation in which Congress has provided for a private damages remedy and has remained silent as to the availability of injunctive relief. Instead, Congress explicitly provided for injunctive relief in § 1964(a), although it did not specify in that section which plaintiffs can seek such relief. Given that the next two sections describe two types of plaintiffs, the government and private plaintiffs, and spell out additional remedies specific to each type, we find that the only logical conclusion is that Congress intended the general remedies explicitly granted in § 1964(a) to be available to all plaintiffs.

Although we would be confident resting our holding purely on the plain text of § 1964, we note that our interpretation is consistent with Congress's admonition that the RICO statute is to be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Adhering to this admonition, which "obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading

of the statute," *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993), the Supreme Court has consistently rejected interpretations by the courts of appeals that would limit the scope of RICO actions in ways not contemplated by the text of the statute. See, *e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, 121 S. Ct. 2087 (2001) (rejecting argument that employee of corporation acting within scope of employment cannot be a "person" distinct from the corporation); *Salinas v. United States*, 522 U.S. 52, 61-66 (1997) (rejecting requirement that conspiracy defendant himself has committed predicate acts); *NOW I*, 510 U.S. at 256-62 (rejecting requirement that enterprise have an economic motive); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (rejecting requirements that defendant has been convicted of predicate act and that plaintiff suffer a "racketeering injury," as opposed to injury from mere predicate acts); *United States v. Turkette*, 452 U.S. 576 (1981) (rejecting argument that RICO enterprise must have legitimate as well as illegitimate aspects). RICO's liberal-construction clause has particular force, as the Supreme Court has stated, when we are construing § 1964, the civil remedy provision, because it is in this section that "RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 491 n.10. In keeping with the spirit of these cases, we decline to restrict the remedies available under RICO, when Congress has provided for broad equitable relief under § 1964(a).

Our interpretation of § 1964 is also in keeping with the underlying purposes of the RICO statute. As the Supreme Court recently noted, Congress in enacting RICO intended to "encourage civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn

them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S. 549, 557 (2000). Recognizing that the statute gives private citizens the ability to seek injunctive relief as well as damages is fully consistent with this role for civil RICO litigation.

Perhaps realizing that the plain text of the statute strongly suggests that private plaintiffs can seek injunctions, the *Wollersheim* court relied heavily in its decision on two pieces of legislative history. First, the court noted that, during the floor debate on the bill in the House, Representative Steiger, the House sponsor of the bill, introduced an amendment that would have, among other things, made private plaintiffs' right to seek injunctive relief explicit. The amendment was withdrawn after another representative described it on the House floor as creating "an additional civil remedy." See *Wollersheim*, 796 F.2d at 1085-86. Second, the court noted that one year after the bill's passage, Congress failed to pass a bill introduced in the Senate with the same language as the Steiger amendment. *See id.* at 1086. From these two occurrences, the Ninth Circuit concluded that "in considering civil RICO, Congress was repeatedly presented with the opportunity expressly to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress rejected the addition of any such provision." *Id.*

Again, with respect, we cannot agree with the Ninth Circuit that these snippets of legislative history amount to the kind of "'clearly expressed legislative intent to the contrary'" that we would require to cast doubt on unambiguous statutory language. *NOW I*, 510 U.S. at 261. Even these excerpts do not unequivocally indicate that Congress intended private plaintiffs

to be limited to damages remedies. As the *Wollersheim* decision itself notes, there are indications in the legislative history to the contrary. 796 F.2d at 1085. More importantly, however, although the *Wollersheim* court may well have made a reasonable decision in 1986 to rely on Congress's refusal to enact amendments to the statute, recent Supreme Court precedent teaches that this type of legislative history is a particularly thin reed on which to rest the interpretation of a statute. *See, e.g., Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."). Given the Court's reluctance in recent years to rely on the type of legislative history that underpins *Wollersheim*, we cannot agree with the Ninth Circuit's earlier view that this legislative history trumps the otherwise plain language of § 1964.

In a last effort to save their reading of the statute, the defendants urge us that certain differences between the language of RICO and the language of section 4 of the Clayton Act (on which RICO was based) demand the inference that no private right to injunctive relief exists under RICO. The Clayton Act, they note, provides private rights of action in two separate sections: one for damages in § 4, 15 U.S.C. § 15(a), and one for injunctive relief in § 16, 15 U.S.C. § 26. RICO, in

contrast, has only one statutory section addressing civil remedies, and the only subsection that specifically talks about private actions mentions only damages. Defendants argue that Congress's failure to include in § 1964(c) language analogous to that in Clayton Act § 16 must mean that it did not intend to allow private parties to seek injunctions.

We reject this line of analysis for a number of reasons. First, the mere fact that the Clayton Act spreads its remedial provisions over a number of different sections of the U.S. Code,[1] and RICO does not, adds little to our understanding of either statute. More importantly, the Supreme Court regularly treats the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language. See, *e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89 (1997) (applying Clayton Act rule for accrual of cause of action to RICO); *Holmes v. SIPC*, 503 U.S. 258, 267 (1992) (applying proximate cause rule to RICO). Since the Court has already determined that litigants other than the Attorney General may obtain broad injunctive relief under the Clayton Act, see *California v. American Stores Co.*, 495 U.S. 271 (1990), cases like *Klehr* and *Holmes* indicate that we ought to adopt the same interpretation with respect to RICO. Indeed, *American Stores* (which came to the Court from the Ninth Circuit) pointedly rejected the way in which the Ninth Circuit had relied on

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[1]The remedial provisions of the Clayton Act are actually spread over far more than the two sections the defendants mention. In addition to §§ 4 and 16, the Clayton Act also includes (as codified) 15 U.S.C. § 15(b) (suits for actual damages brought by foreign governments), 15 U.S.C. § 15a (suits for treble damages brought by the United States for its own injuries to business or property), 15 U.S.C. § 15c (parens patriae suits brought by state attorneys general for treble damages on behalf of natural persons in the state), and 15 U.S.C. § 25 (actions for injunctive relief brought by the Attorney General).

legislative history to limit the Clayton Act's textual grant of private injunctive relief. *Id* at 285. This in turn undercut *Wollersheim*, which had used the same methodology as the discredited *American Stores* opinion. For all these reasons, we find that § 1964 authorizes injunctive relief at the behest of both the Attorney General and private plaintiffs, authorizes interim measures when the Attorney General sues, and authorizes private treble damages only for private plaintiffs (and not the United States). The district court thus correctly concluded that RICO authorized the private plaintiffs here to seek injunctive relief.

III

With this much established, we may turn to the defendants' First Amendment arguments. All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions. We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct. But the record is replete with evidence of instances in which their conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts. As is true in many political protest cases, the defendants' protected speech was often closely intertwined with their unprotected illegal conduct. Nevertheless, we believe the district court adequately ensured that the jury's verdict was not based on activities protected by the First Amendment, and that the remedies it ordered also

respected the line between protected expression and unprotected conduct.

The defendants' First Amendment arguments fall into two categories. First, they argue broadly that imposing liability on them on the basis of their protest activities violates the First Amendment. Second, they argue that, even assuming they could constitutionally be held liable for their alleged conduct, the jury instructions and verdict form in this case did not contain necessary First Amendment safeguards. Before we reach either of these arguments, we pause to consider the standard of review we should apply in analyzing the defendants' First Amendment claims.

The Supreme Court has repeatedly held that, in cases in which First Amendment concerns are implicated, reviewing courts have an obligation to conduct an "'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964). Although this maxim has been applied most often in cases reviewing the factual findings of lower courts, the Court in *Bose* noted that the rule is equally applicable "whether the factfinding function be performed in the particular case by a jury or by a trial judge." 466 U.S. at 501. Citing this rule, the defendants urge that our review of their First Amendment challenges must be plenary.

As we have noted before, however, even though *Bose* calls for an "independent examination of the whole record," it is not entirely clear what this "plenary" review is supposed to entail.

See *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987). In particular, it is not clear whether *Bose* requires an independent review only of the ultimate factual conclusion that the defendants' conduct fell outside the protection of the First Amendment, or whether this court is required to conduct a more searching review of "findings of underlying facts, evaluations of credibility, and the drawing of inferences." *Brown & Williamson*, 827 F.2d at 1128. In cases in which we are reviewing a jury verdict rather than the findings of a lower court, the question is even more complex, because we must somehow reconcile the defendants' First Amendment rights against the command of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. *Bose* itself involved review of facts found by the district court under Fed. R. Civ. P. 52(a), and thus the Court had no occasion to consider this problem. For a different reason, we conclude that it is not necessary here to decide whether or not a broader version of the re-examination of jury findings is permissible when First Amendment rights are at issue. Even assuming that the *Bose dicta* requires us to conduct a plenary review of all of the factual findings relevant to the First Amendment issues before us (which is the most favorable position we can take for the defendants), we find that the jury's determinations are fully supported by the record.

A.

Protection of politically controversial speech is at the core of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, urging the clinics to get out

of the abortion business, and urging clinic patients not to seek abortions is fully protected by the First Amendment. See, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). It is equally clear, however, that the First Amendment does not protect violent conduct, *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993), nor does it protect threats, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 773 (1994), or language used to carry out illegal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Even when a defendant's conduct involves expressive elements, the government is free to regulate the non-expressive aspects of the conduct if such regulation is necessary to serve important government interests. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The protection of the plaintiffs' rights to seek and provide medical care free from violence, intimidation, and harassment is such an important government interest. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 715 (2000); *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 376 (1997); *Madsen, supra*, 512 U.S. at 768. As the Supreme Court has explained, "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

In this case, the plaintiffs presented ample evidence that the individual defendants and others associated with PLAN engaged in illegal conduct that directly threatened an important governmental interest. The evidence presented at trial showed that, at PLAN-sponsored events, protesters trespassed on clinic property and blocked access to clinics with their bodies, including at times chaining themselves in the doorways of clinics or to operating tables. At other times, protesters

destroyed clinic property, including putting glue in clinic door locks and destroying medical equipment used to perform abortions. On still other occasions, protesters physically assaulted clinic staff and patients. In addition, defendant Scheidler, on behalf of defendants PLAL and PLAN, sent letters to class clinics threatening that they would be subjected to similar attacks if they did not cease performing abortions. In light of the protesters' conduct at other PLAN events, the district court correctly concluded that these letters were not protected political speech but constituted true threats outside the protection of the First Amendment.

Assuming that the defendants can be held liable for these incidents, all of which occurred under PLAN sponsorship, then the plaintiffs produced ample evidence of illegal conduct that may legitimately be regulated given the importance of the governmental interest in protecting the right to seek and provide medical care. In a case where a similarly important governmental interest is not present and the conduct in question has an expressive element, we do not disagree with the defendants that the First Amendment might well shield that particular conduct from being used as the basis for RICO liability. (We express this thought cautiously only because the balance between the strength of the government's interest and the degree to which conduct has an expressive element will vary from case to case.) In any event, this case presents no such problems. We are satisfied that the record here easily supports the jury's finding of liability.

At this point, the defendants shift their argument to a more personal one: maybe someone associated with PLAN was engaged in unprotected conduct, but the evidence did not

establish that the defendants themselves were involved, as opposed to being involved exclusively in PLAN's protected speech activities. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Supreme Court noted that, where an organization engages in both protected speech and unprotected, illegal conduct, the First Amendment does not permit individuals to be held liable for the organization's illegal acts merely based on their association with the organization. *Id.* at 908-09. Rather, in order to impose liability on an individual based on that individual's association with an organization, a plaintiff must show both that the organization itself, rather than just isolated members, possessed unlawful goals and that the individual defendant held a specific intent to further those illegal aims. *Id.* at 920.

We agree that *Claiborne Hardware* is directly applicable to our case. Although the plaintiffs established that the individual defendants themselves participated in many of the incidents described during the trial, the plaintiffs also introduced evidence of many other incidents coordinated or orchestrated by PLAN for which they did not specifically show that the individual defendants themselves committed the illegal acts described. In order for the defendants to be held responsible for acts committed by other members of PLAN during PLAN-organized events, *Claiborne Hardware* required the plaintiffs to show that PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN.

Even though this is an exacting test, once again the record shows that the plaintiffs satisfied it in this case. All of the individual defendants who remain in the case were on the board of directors of PLAL. PLAL and Operation Rescue, the two remaining organizational defendants, were in turn the primary organizers of PLAN. The plaintiffs put into evidence numerous letters, newsletters, and other publications authored by defendant Joseph Scheidler, executive director of PLAL, and by Randall Terry, executive director of Operation Rescue, detailing the activities planned for upcoming PLAN events. The activities detailed in these letters included blocking access to clinics and entering clinics to block passageways. As noted above, these types of protest activities are illegal conduct unprotected by the First Amendment. Similarly, the threatening letters to plaintiff clinics were sent on PLAL letterhead, signed by Scheidler, and specifically described the threat as coming from PLAN. The jury was entitled to conclude from this evidence that PLAN itself, not merely isolated members, held illegal aims.

It is also significant that all of the individual defendants were high-level leaders within PLAN, and as such they knew of PLAN's illegal aims and intended to further those aims. The record showed that defendant Scheidler personally organized and coordinated many of PLAN's activities. Defendants Scholberg and Murphy also participated in planning meetings for PLAN events at which illegal blockades were to take place and spoke at PLAN conventions designed to train protesters in the use of these tactics. The plaintiffs presented more than enough evidence to convince us that the individual defendants actively intended to further PLAN's illegal goals.

B.

Turning to the defendants' narrower First Amendment argument, the defendants contend that, regardless of whether there was sufficient evidence from which the jury could have found that they engaged in unprotected activities, the jury instructions and verdict form used by the trial court allowed the jury to find the defendants liable based solely on the defendants' protected speech. The verdict form that the district court used asked the following relevant questions:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

2. Were the . . . defendants associated with PLAN? (*See* Jury Instruction No. 20 for the definition of "associated with.")

. . .

4. Did any Defendant, or any other person associated with PLAN, commit any of the [alleged predicate acts]?

The jury instruction to which the verdict form referred stated, in relevant part:

> Jury Instruction No. 20: Plaintiffs must show that the defendant was "associated with" PLAN. That is, the defendant must have had some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not

necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by the other people who were associated with PLAN. . . . .

In the district court, the defendants objected to these instructions, arguing that they did not require the jury to find that the defendants harbored a specific intent to further PLAN's illegal aims, as required by *Claiborne Hardware*. The district court apparently agreed, because it added an additional jury instruction which stated:

Jury Instruction No. 30 -- Defendants' Liability for Acts of Others

Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

The defendants did not renew their objection to the jury instructions after the district court made this change. Nevertheless, in this court, the defendants have argued that, even with the additional instruction, the jury instructions did not adequately protect their First Amendment rights, because the *Claiborne Hardware* standard was incorporated only into the jury instructions, not into the verdict form.

Initially, we note that by not renewing their objection to the jury instructions and verdict form after the district court added Instruction 30, the defendants at least implied that they were satisfied with the court's resolution of their objection. Accordingly, we are inclined to find that the defendants have waived any objection to those instructions on appeal. *See United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000) (objection to jury instruction waived where defense counsel agreed to instruction at trial). Because this is a civil trial, not a criminal trial, there is no equivalent of "plain error" review for a challenge that is forfeited rather than waived. In the interest of absolute fairness, however, we will consider this point based on the earlier objections.

Our review of jury instructions is deferential, and we consider only whether the instructions, taken as a whole, adequately informed the jury of the applicable law. *Molnar v. Booth*, 229 F.3d 593, 602 (7th Cir. 2000). We are confident that these instructions did so. This jury could not have found the defendants liable without finding that the defendants themselves specifically intended to further PLAN's illegal aims. Jury Instruction 30 made this requirement explicit, and absent any indication to the contrary, we presume that jurors follow the instructions they are given. *Miksis v. Howard*, 106 F.3d 754, 763 (7th Cir. 1997). There is no requirement for a district judge to replicate every instruction on the verdict form itself. We are confident that the jurors followed their instructions, heeded Instruction 30 when they considered the questions on the special verdict form, and that nothing on the form misled or confused them or caused them to ignore their instructions.

IV

The last serious contention we must address is the defendants' argument that the injunction in this case is vague and overbroad. The operative portion of the injunction reads as follows:

> Defendants . . . and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly:
>
> a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (including but not limited to abortion services), by:
>
> (1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;
>
> (2) trespassing on the premises or the private property of any Plaintiff Clinic;
>
> (3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> (4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or

any woman who seeks to use the services of such a Clinic;

b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others; or

c. Operating an enterprise through any of the Acts described above.

This injunction does not prohibit or preclude activities that are constitutionally protected, including but not limited to the following conduct:

a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic;

d. Handing out literature on public property; and

e. Praying on public property.

This injunction shall bind Defendants . . . and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN.

The defendants raise two principal objections to the scope of the injunction. First, they complain that it contains a number of terms that are vague or indefinite, and that as such, it is likely to chill a substantial amount of protected speech. Second, the defendants charge that the injunction makes them liable for the conduct of persons they do not control and for actions they do not authorize or approve. We consider each of these contentions in turn.

First, we recognize that it is a delicate task to craft an injunction that prohibits illegal conduct when that conduct is closely tied to political protests and other protected activity. The court must tread carefully to avoid hampering protected speech. Here, we do not disagree with the proposition that some language in this injunction, taken in the abstract, is rather general. But the key question is: Compared to what? Any effort to deal with a case of this complexity will inevitably involve some imprecision. Many criminal statutes contain key terms such as the word "material" which are somewhat imprecise but have never been considered void for vagueness. The defendants in this case never proposed any alternative language for an injunction, despite several invitations from the district court to do just that, so the real question is whether the injunction the court entered is as precise as possible while still insuring that the defendants' illegal activities are enjoined.

We are satisfied that the injunction drafted by the district court here has struck the proper balance and has avoided any risk of curtailing protected activities. By its terms, the injunction prohibits only illegal conduct -- trespassing, obstructing access to clinics, damaging property, using violence or threats of violence, or aiding, abetting, inducing, directing,

or inciting any of these acts. We do not find any ambiguity in the terms the district court used to describe the prohibited conduct, and as discussed above, none of this conduct is protected by the First Amendment.

Although we do not believe that the terms of the injunction would reach protected speech in any case, the injunction itself includes an additional safeguard. A specific provision underscores that it does not prohibit peaceful picketing, speeches, or praying on public property, attempts to speak with patients and staff, handing out literature, or any other activity protected by the First Amendment. Given this explicit language, there can be no doubt that this injunction reaches only unprotected, illegal conduct, not protected speech. The defendants' alarmist prediction that, under the terms of the injunction, a protester who engages in "months of peaceful picketing" and then takes "two accidental footsteps onto private property" could be subject to contempt proceedings not only for trespass but also for the picketing is pure fancy and bears no relation to the actual wording of the injunction.

Nor do we find that the injunction impermissibly holds the defendants responsible for the actions of persons beyond their control. The injunction applies only to the defendants and to persons working in "active concert" with the defendants or in concert with PLAN. For that reason alone, the injunction's sweep is not so broad as the defendants suggest. Activists and protesters not closely associated with the defendants or with PLAN, an organization the defendants control, are not affected by the injunction. (This takes care of the specter of renegades who, the defendants assert, are utterly beyond their control.) Moreover, to the extent the injunction reaches the conduct of

individuals not named in this lawsuit, the order enjoins those individuals from violating its mandates. If individuals acting in concert with the defendants or PLAN violate the injunction, without inducement or direction by the defendants, the violators, not the defendants, would be in contempt of the court's order. Nothing in the order purports to hold the defendants liable for actions they do not direct, incite, or control.

The injunction as it is written is narrowly tailored to prohibit the specific types of illegal conduct that the defendants have engaged in on past protest missions. As such, it does not threaten the defendants' First Amendment rights. We are confident that the district court will take as much care in enforcing the injunction as it plainly took in crafting it. Indeed, with its explicit protection of peaceful picketing, speech, literature, and prayer, perhaps in the end the injunction may further rational discourse on one of the most volatile political controversies facing the nation today. Violence in any form is the antithesis of reasoned discussion. By directing those with passionate views about the abortion controversy -- on either side -- away from the use of threats and violence and back to "all the peaceful means for gaining access to the mind," the injunction the district court issued is in harmony with the fundamental First Amendment protection of free speech.

V

The defendants have raised a hodgepodge of other challenges to the judgment, none of which need detain us long. First, the defendants point out that in the plaintiffs' First and Second Amended Complaints (which were filed before the first set of

appeals in the case) only the clinic plaintiffs alleged RICO claims; NOW joined only the counts alleging antitrust violations. As noted above, when the Supreme Court granted certiorari to review our earlier decision in this case, that grant was limited to questions concerning the RICO counts. The antitrust claims fell out of the case after the Court declined to review our decision with respect to them. According to the defendants, once all the counts to which NOW was a party fell out of the case, the effect was the same as a final judgment against NOW, and res judicata barred the plaintiffs from amending their complaint to include NOW as a plaintiff in the RICO counts. The district court, however, permitted the plaintiffs to file a Third Amended Complaint, after remand from this court, which included NOW as a plaintiff in the RICO counts.

Whether to allow amendments to a complaint is a question committed to the discretion of the trial court. *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001). Contrary to the defendants' assertion, there was no final judgment in this case after the Supreme Court's decision to which res judicata principles could apply. The case was still pending, first in this court and then in the district court. As a general rule, amendments to complaints are liberally allowed up to and even after trial, judgment, and appeal. *See United States v. Security Pac. Bus. Credit, Inc.*, 956 F.2d 703, 707-08 (7th Cir. 1992); *see also Guse v. J.C. Penney Co.*, 570 F.2d 679, 680 (7th Cir. 1978) (even after plaintiff lost on appeal, there was no final judgment against plaintiff, and district court was free to allow plaintiff to file amended complaint putting forth new legal theory). The Supreme Court made it clear in its opinion that it was evaluating the complaint only on the pleadings, *see*

510 U.S. at 256, 262, which is the most preliminary stage of proceedings one can imagine. The district court was thus well within its discretion in allowing NOW to continue as a plaintiff for the RICO claims in the Third Amended Complaint.

The defendants also argue that the clinics' claims are barred by *res judicata*. While this case was pending, one of the plaintiff clinics, Summit Women's Health Organization, filed suit in state court in Wisconsin seeking an injunction against Scheidler and several other defendants to prevent PLAN from engaging in illegal blockades during a PLAN convention in Milwaukee. The Wisconsin courts ultimately dismissed that lawsuit without prejudice as to most of the defendants. However, before the case was dismissed, Scheidler and the Summit Women's Health Organization entered into a settlement agreement that specified that "all claims against [Scheidler] relating to conduct which occurred prior to the signing of this stipulation are hereby dismissed as to [Summit] with prejudice." The defendants argue that, because the claims that Summit raises in this case had already accrued at the time Summit entered into this stipulation, Summit is barred from bringing these claims in this lawsuit.

We need not consider what preclusive effect the Wisconsin settlement might have, because the defendants waived this issue in the district court. *Res judicata* is an affirmative defense that is waived if a party does not plead it. Fed. R. Civ. P. 8(c). Under the local rules of the Northern District of Illinois, the defendants were required to list all their defenses in their trial brief, and any defenses not listed were waived. The defendants admit that they did not list res judicata based on the Wisconsin litigation as an affirmative defense in their trial brief, and

accordingly they have lost the opportunity to argue that issue here. Although we find that this claim is waived, we also note that, even if it were not waived and if the Wisconsin settlement had a preclusive effect in this case, the preclusion could run only between Summit and Scheidler and would not affect any of the other plaintiffs, including the class members, or any of the other defendants. The injunction would not be affected, all of the defendants would remain jointly liable for the damages to Delaware Women's Health Organization, and all of the defendants except Scheidler would remain liable to Summit. The practical effect of any preclusion would therefore be negligible.

The defendants have also urged this court to decertify the two classes, arguing that NOW and the named clinics are inadequate class representatives. The defendants particularly object to the district court's decision to include in the NOW class women who are not members of NOW, arguing that because NOW is a partisan advocacy group and the issues involved in this case concern a matter of great social controversy, NOW is likely to have interests antagonistic to the views of some members of the class. Class certification decisions are committed to the discretion of the district court, however, see *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001), and we find that the district court's decision to certify the two classes here was well within the court's discretion. It is inaccurate in any event to imply that the district court certified a class of "all women." The court did no such thing. Instead, it certified a class that included only those women, whether or not members of NOW, whose right to seek abortion services has been or will be interfered with by the defendants. In order for these women's interests to be

antagonistic to the claims NOW is bringing, the defendants would have to argue that at least some women in the class want to seek abortion services, but do not want to be free from harassment and intimidation while doing so. This scenario strikes us as exceedingly unlikely; at the very least, we agree with the district court that it "is clearly speculative and projects personally held views onto the plaintiff class." *National Organization for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 362 (N.D. Ill. 1997).

As to the defendants' more general arguments that the named plaintiffs have not performed adequately as class representatives, we note that the named plaintiffs have pursued this litigation diligently for fifteen years, through a trip to the Supreme Court of the United States and a seven-week trial, and ultimately were successful in securing a nationwide injunction against the defendants prohibiting the conduct they set out to challenge. Given this record of performance, we cannot say that the district court in any way abused its discretion in certifying these classes.

The defendants have also argued that the conduct in which they engaged is not prohibited by RICO for a number of reasons. First, the plaintiffs alleged as predicate acts numerous violations of the federal extortion statute, the Hobbs Act, 18 U.S.C. § 1951, and the defendants argue that the Hobbs Act does not apply to their conduct. The defendants' primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," and that the things the plaintiffs claim were taken here -- the class women's rights to seek medical services from the

clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses -- cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, *see, e.g., United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here.

In a similar vein, the defendants assert that, even if "property" was involved, the defendants did not "obtain" that property; they merely forced the plaintiffs to part with it. Again, this argument is contrary to a long line of precedent in this circuit holding that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995).

In addition to their challenges to the application of the Hobbs Act, the defendants argue that the district court erred in giving the jury a generic instruction describing the elements of the state law extortion offenses the plaintiffs alleged as additional predicate acts. According to the defendants, there are substantial differences in the extortion laws of the states in which these alleged predicate acts occurred, and the district court's attempt to cover all the relevant state laws with a single, generic instruction impermissibly discounted these differences. Without expressing an opinion on whether this approach was permissible, we simply note that, if any error occurred, it was harmless. The jury found that the defendants committed 21 predicate acts under the Hobbs Act alone, which is far in excess

of the two predicate acts that RICO requires. In the face of this finding, any error in the state extortion law instructions, which could at most have affected the jury's decision on the additional state-law predicate acts it found, could not have had any effect on the outcome of this case.

Finally, while this appeal was pending, the defendants filed motions in the district court seeking relief from the judgment under Rules 60(b)(2) and (3). The district court denied the motions, and the defendants appealed. We consolidated that appeal with this case and suspended briefing on the 60(b) issues. We have reviewed the defendants' motions in the trial court and the trial court's resolution of those issues, and we conclude that no further briefing on the issues is necessary.

"Rule 60(b) relief is an extraordinary remedy granted only in exceptional circumstances." *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000). Our review of the district court's decision denying relief is deferential, and we will reverse only if the district court has abused its discretion. *J&W Fence Supply Co. v. United States*, 230 F.3d 896, 898 (7th Cir. 2000). We find no abuse of discretion in this case. In their 60(b) motions, the defendants argued that they had newly discovered evidence relating to two specific incidents described by witnesses during the trial. In addition, the defendants posited that newly discovered evidence called into doubt whether an anonymous witness who testified at the trial in fact needed to remain anonymous. The district court denied the motions on the grounds that the defendants had documents in their possession from which they could have discovered most of the "new" evidence for well over a decade, and that relief at this late date accordingly was not warranted. In addition, the court noted that

it was very unlikely that any of the "new" evidence, if admitted at trial, would have had any impact on the jury's verdict. Given that Rule 60 motions cannot be used to present evidence that with due diligence could have been introduced before judgment, *Rutledge*, 230 F.3d at 1052, or to put forth evidence that is not material or that would likely not change the result at trial, *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999), we find no error in the district court's denial of relief.

We have considered all of the defendants' remaining contentions, but find none that requires comment. For the foregoing reasons, the judgment of the district court is AFFIRMED in all respects.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

No. 92-780

NATIONAL ORGANIZATION FOR WOMEN, INC., ETC., ET AL., PETITIONERS

v.

JOSEPH SCHEIDLER ET AL.

December 8, 1993, Argued

January 24, 1994, Decided

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We are required once again to interpret the provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) chapter of the Organized Crime Control Act of 1970 (OCCA), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (1988 ed. and Supp. IV). Section 1962(c) prohibits any person associated with an enterprise from conducting its affairs through a pattern of racketeering activity. We granted certiorari to determine whether RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. We hold that RICO requires no such economic motive.

I

Petitioner National Organization for Women, Inc. (NOW), is a national nonprofit organization that supports the legal availability of abortion; petitioners Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (SWHO), are health care centers that perform abortions and other medical procedures. Respondents are a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler and other individuals and organizations that oppose legal abortion, and a medical laboratory that formerly provided services to the two petitioner health care centers.[1]

Petitioners sued respondents in the United States District Court for the Northern District of Illinois, alleging violations of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.*, and RICO's §§ 1962(a), (c), and (d), as well as several pendent state-law claims stemming from the activities of antiabortion protesters at the clinics. According to respondent Scheidler's congressional testimony, these protesters aim to shut down the clinics and persuade women not to have abortions. *See, e.g.*, Abortion Clinic Violence, Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 99th Cong., 1st and 2d Sess., 55 (1987) (statement of Joseph M. Scheidler, Executive Director, Pro-Life Action League). Petitioners sought injunctive

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[1]The other respondents named in the complaint include the following: John Patrick Ryan, Randall A. Terry, Andrew Scholberg, Conrad Wojnar, Timothy Murphy, Monica Migliorino, Vital-Med Laboratories, Inc., Pro-Life Action League, Inc. (PLAL), Pro-Life Direct Action League, Inc. (PDAL), Operation Rescue, and Project Life.

relief, along with treble damages, costs, and attorney's fees. They later amended their complaint, and pursuant to local rules, filed a "RICO Case Statement" that further detailed the enterprise, the pattern of racketeering, the victims of the racketeering activity, and the participants involved.

The amended complaint alleged that respondents were members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity including extortion in violation of the Hobbs Act, 18 U.S.C. § 1951.[2] Section 1951(b)(2) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Petitioners alleged that respondents conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics. App. 66, Second Amended Complaint ¶ 97. Petitioners claimed that this conspiracy "has injured the business and/or property interests of the [petitioners]." *Id.*, at 72, ¶ 104. According to the amended complaint, PLAN constitutes the alleged racketeering "enterprise" for purposes of § 1962(c). *Id.*, at 72-73, ¶¶ 107-109.

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[2]The Hobbs Act, 18 U.S.C. § 1951(a), provides: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." Respondents contend that petitioners are unable to show that their actions violated the Hobbs Act. We do not reach that issue and express no opinion upon it.

The District Court dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6). Citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), it held that since the activities alleged "involved political opponents, not commercial competitors, and political objectives, not marketplace goals," the Sherman Act did not apply. 765 F. Supp. 937, 941 (ND Ill. 1991). It dismissed petitioners' RICO claims under § 1962(a) because the "income" alleged by petitioners consisted of voluntary donations from persons opposed to abortion which "in no way were derived from the pattern of racketeering alleged in the complaint." *Ibid.* The District Court then concluded that petitioners failed to state a claim under § 1962(c) since "an economic motive requirement exists to the extent that some profit-generating purpose must be alleged in order to state a RICO claim." *Id.*, at 943. Finally, it dismissed petitioners' RICO conspiracy claim under § 1962(d) since petitioners' other RICO claims could not stand.

The Court of Appeals affirmed. 968 F.2d 612 (CA7 1992). As to the RICO counts, it agreed with the District Court that the voluntary contributions received by respondents did not constitute income derived from racketeering activities for purposes of § 1962(a). *Id.*, at 625. It adopted the analysis of the Court of Appeals for the Second Circuit in *United States v. Ivic*, 700 F.2d 51 (1983), which found an "economic motive" requirement implicit in the "enterprise" element of the offense. The Court of Appeals determined that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO." 968 F.2d at 629. Consequently, petitioners failed to state a claim under § 1962(c). The Court of

Appeals also affirmed dismissal of the RICO conspiracy claim under § 1962(d).

We granted certiorari, 508 U.S. 971 (1993), to resolve a conflict among the Courts of Appeals on the putative economic motive requirement of 18 U.S.C. §§ 1962(c) and (d). *Compare United States v. Ivic, supra,* and *United States v. Flynn*, 852 F.2d 1045, 1052 (CA8), ("For purposes of RICO, an enterprise must be directed toward an economic goal"), *cert. denied*, 488 U.S. 974, 102 L. Ed. 2d 546, 109 S. Ct. 511 (1988), *with Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (CA3) (because the predicate offense does not require economic motive, RICO requires no additional economic motive), *cert. denied*, 493 U.S. 901 (1989).

II

We first address the threshold question raised by respondents whether petitioners have standing to bring their claim. Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-547 (1986). Respondents are correct that only DWHO and SWHO, and not NOW, have sued under RICO.[3] Despite the fact that the clinics attempted to bring the RICO claim as class actions, DWHO and SWHO must themselves have standing. *Simon v. Eastern Ky.*

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[3]NOW sought class certification for itself, its women members who use or may use the targeted health centers, and other women who use or may use the services of such centers. The District Court did not certify the class, apparently deferring its ruling until resolution of the motions to dismiss. All pending motions were dismissed as moot when the court granted respondents' motion to dismiss. 765 F. Supp. 937, 945 (ND Ill. 1991).

Welfare Rights Organization, 426 U.S. 26, 40, n.20 (1976), citing *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Respondents are wrong, however, in asserting that the complaint alleges no "injury" to DWHO and SWHO "fairly traceable to the defendant's allegedly unlawful conduct." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

We have held that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). The District Court dismissed petitioners' claim at the pleading stage pursuant to Federal Rule of Civil Procedure 12(b)(6), so their complaint must be sustained if relief could be granted "under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). DWHO and SWHO alleged in their complaint that respondents conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere. App. 66, Second Amended Complaint ¶ 97. Petitioners claimed that this conspiracy "has injured the business and/or property interests of the [petitioners]." *Id.*, at 72, ¶ 104. In addition, petitioners claimed that respondent Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic. *Id.*, at 68, ¶ 98(g). Paragraphs 106 and 110 of petitioners' complaint incorporate these allegations into the § 1962(c) claim. *Id.*, at 72, 73. Nothing more is needed to confer standing on DWHO and SWHO at the pleading stage.

III

We turn to the question whether the racketeering enterprise or the racketeering predicate acts must be accompanied by an underlying economic motive. Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Section 1961(1) defines "pattern of racketeering activity" to include conduct that is "chargeable" or "indictable" under a host of state and federal laws.[4] RICO broadly defines

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[4]Section 1961(1) provides: "'racketeering activity' means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering) . . . (C) any act which is indictable under title

(continued...)

"enterprise" in § 1961(4) to "include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Nowhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required.

The phrase "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" comes the closest of any language in subsection (c) to suggesting a need for an economic motive. Arguably an enterprise engaged in interstate or foreign commerce would have a profit-seeking motive, but the language in § 1962(c) does not stop there; it includes enterprises whose activities "affect" interstate or foreign commerce. Webster's Third New International Dictionary 35 (1969) defines "affect" as "to have a detrimental influence on -- used especially in the phrase *affecting commerce*." An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives.

The Court of Appeals thought that the use of the term "enterprise" in §§ 1962(a) and (b), where it is arguably more tied in with economic motivation, should be applied to restrict the breadth of use of that term in § 1962(c). 968 F.2d at 629.

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[4](...continued)
29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds). (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . ."

Respondents agree and point to our comment in *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 489 (1985), regarding the term "violation," that "we should not lightly infer that Congress intended the term [violation] to have wholly different meanings in neighboring subsections."

We do not believe that the usage of the term "enterprise" in subsections (a) and (b) leads to the inference that an economic motive is required in subsection (c). The term "enterprise" in subsections (a) and (b) plays a different role in the structure of those subsections than it does in subsection (c). Section 1962(a) provides that it "shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Correspondingly, § 1962(b) states that it "shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." The "enterprise" referred to in subsections (a) and (b) is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity and may very well be a "profit-seeking" entity that represents a property interest and may be acquired. But the statutory language in subsections (a) and (b) does not mandate that the enterprise be a "profit-seeking" entity; it simply requires that

the enterprise be an entity that was acquired through illegal activity or the money generated from illegal activity.

By contrast, the "enterprise" in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity. Subsection (c) makes it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." Consequently, since the enterprise in subsection (c) is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity.[5] Nothing in subsections (a) and (b) directs us to a contrary conclusion.

The Court of Appeals also relied on the reasoning of *United States v. Bagaric*, 706 F.2d 42 (CA2), *cert. denied*, 464 U.S. 840 (1983), to support its conclusion that subsection (c) requires an economic motive. In upholding the convictions, under RICO, of members of a political terrorist group, the *Bagaric* court relied in part on the congressional statement of findings which prefaces RICO and refers to the activities of groups that "'drain billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption.'" 706 F.2d at 57, n.13 (quoting OCCA, 84 Stat. 922). The Court of Appeals for the Second Circuit decided that

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[5]One commentator uses the terms "prize," "instrument," "victim," and "perpetrator" to describe the four separate roles the enterprise may play in § 1962. See Blakey, The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 307-325 (1982).

the sort of activity thus condemned required an economic motive.

We do not think this is so. Respondents and the two Courts of Appeals, we think, overlook the fact that predicate acts, such as the alleged extortion, may not benefit the protesters financially but still may drain mon y from the economy by harming businesses such as the clinics which are petitioners in this case.

We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of the Act. As we said in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248 (1989): "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."

In *United States v. Turkette*, 452 U.S. 576 (1981), we faced the analogous question whether "enterprise" as used in § 1961(4) should be confined to "legitimate" enterprises. Looking to the statutory language, we found that "there is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." *Id.*, at 580. Accordingly, we resolved that § 1961(4)'s definition of "enterprise" "appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones." *Id.*, at 580-581. We noted that Congress could easily have narrowed the

sweep of the term "enterprise" by inserting a single word, "legitimate." *Id.*, at 581. Instead, Congress did nothing to indicate that "enterprise" should exclude those entities whose sole purpose was criminal.

The parallel to the present case is apparent. Congress has not, either in the definitional section or in the operative language, required that an "enterprise" in § 1962(c) have an economic motive.

The Court of Appeals also found persuasive guidelines for RICO prosecutions issued by the Department of Justice in 1981. The guidelines provided that a RICO indictment should not charge an association as an enterprise, unless the association exists "'for the purpose of maintaining operations directed toward an *economic* goal . . . .'" *United States v. Ivic*, 700 F.2d at 64, quoting U.S. Dept. of Justice, United States Attorneys' Manual § 9-110.360 (1984) (emphasis added). The Second Circuit believed these guidelines were entitled to deference under administrative law principles. *See* 700 F.2d at 64. Whatever may be the appropriate deference afforded to such internal rules, *see, e. g., Crandon v. United States*, 494 U.S. 152, 177 (1990) (SCALIA, J., concurring in judgment), for our purposes we need note only that the Department of Justice amended its guidelines in 1984. The amended guidelines provide that an association-in-fact enterprise must be "directed toward an economic *or other identifiable goal*." U.S. Dept. of Justice, United States Attorney's Manual § 9-110.360 (Mar. 9, 1984) (emphasis added).

Both parties rely on legislative history to support their positions. We believe the statutory language is unambiguous

and find in the parties' submissions respecting legislative history no such "clearly expressed legislative intent to the contrary" that would warrant a different construction. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993), citing *United States v. Turkette, supra*, at 580, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Respondents finally argue that the result here should be controlled by the rule of lenity in criminal cases. But the rule of lenity applies only when an ambiguity is present; "'it is not used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" *Turkette, supra*, at 587-588, n.10, quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961) (footnote omitted). We simply do not think there is an ambiguity here which would suffice to invoke the rule of lenity. "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Sedima*, 473 U.S. at 499 (quoting *Haroco, Inc. v. American Nat. Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (CA7 1984)).[6]

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[6]Several of the respondents and several *amici* argue that application of RICO to antiabortion protesters could chill legitimate expression protected by the First Amendment. However, the question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise or racketeering activity has an overriding economic motive. None of the respondents made a constitutional argument as to the proper construction of RICO in the Court of Appeals, and their constitutional argument here is directed almost entirely to the nature of their activities, rather than to the construction of RICO. We therefore decline to address the First Amendment question argued by

(continued...)

We therefore hold that petitioners may maintain this action if respondents conducted the enterprise through a pattern of racketeering activity. The questions whether respondents committed the requisite predicate acts, and whether the commission of these acts fell into a pattern, are not before us. We hold only that RICO contains no economic motive requirement.

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE SOUTER, with whom JUSTICE KENNEDY joins, concurring.

I join the Court's opinion and write separately to explain why the First Amendment does not require reading an economic-motive requirement into the Racketeer Influenced and Corrupt Organizations Act (RICO or statute), and to stress that the Court's opinion does not bar First Amendment challenges to RICO's application in particular cases.

Several respondents and *amici* argue that we should avoid the First Amendment issues that could arise from allowing RICO to be applied to protest organizations by construing the statute to require economic motivation, just as we have previously interpreted other generally applicable statutes so as to avoid First Amendment problems. See, *e.g.*, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,

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[9](...continued)
respondents and the *amici*.

365 U.S. 127, 138 (1961) (holding that antitrust laws do not apply to businesses combining to lobby the government, even where such conduct has an anticompetitive purpose and an anticompetitive effect, because the alternative "would raise important constitutional questions" under the First Amendment); see also *Lucas v. Alexander*, 279 U.S. 573, 577 (1929) (a law "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity"). The argument is meritless in this case, though, for this principle of statutory construction applies only when the meaning of a statute is in doubt, see *Noerr, supra,* and here "the statutory language is unambiguous," *ante*, at 261.

Even if the meaning of RICO were open to debate, however, it would not follow that the statute ought to be read to include an economic-motive requirement, since such a requirement would correspond only poorly to free-speech concerns. Respondents and *amici* complain that, unless so limited, the statute permits an ideological organization's opponents to label its vigorous expression as RICO predicate acts, thereby availing themselves of powerful remedial provisions that could destroy the organization. But an economic-motive requirement would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling. An economic-motive requirement might also prove to be under-protective, in that entities engaging in vigorous but fully protected expression might fail the proposed economic-motive test (for even protest movements need money) and so be left exposed to harassing RICO suits.

An economic-motive requirement is, finally, unnecessary, because legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise. Accordingly, it is important to stress that nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case. Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 917 (1982) (holding that a state common-law prohibition on malicious interference with business could not, under the circumstances, be constitutionally applied to a civil-rights boycott of white merchants). And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (invalidating under the First Amendment a court order compelling production of the NAACP's membership lists, issued to enforce Alabama's requirements for out-of-state corporations doing business in the State). See also *NAACP v. Claiborne Hardware Co., supra*, at 930-932 (discussing First Amendment limits on the assessment of derivative liability against ideological organizations); *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (CA9 1991) (applying a heightened pleading standard to a complaint based on presumptively protected First Amendment conduct).

This is not the place to catalog the speech issues that could arise in a RICO action against a protest group, and I express no view on the possibility of a First Amendment claim by the

respondents in this case (since, as the Court observes, such claims are outside the question presented, *see ante*, at 262, n.6). But I think it prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91-2468

NATIONAL ORGANIZATION FOR WOMEN, INCORPORATED, on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED, on behalf of themselves and all other similarly situated clinics,
Plaintiffs-Appellants,

v.

JOSEPH M. SCHEIDLER, JOHN P. RYAN, RANDALL A. TERRY, ANDREW D. SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INCORPORATED, PRO-LIFE ACTION LEAGUE, INCORPORATED, PRO-LIFE DIRECT ACTION LEAGUE, INCORPORATED, PROJECT LIFE, and OPERATION RESCUE, Defendants-Appellees.

May 16, 1994, Decided

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES.

Before Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. WILLIAM J. BAUER, Circuit Judge, Hon. BRUCE M. VAN SICKLE, District Judge.*

ORDER

The plaintiffs, the National Organization for Women, Incorporated, the Delaware Women's Health Organization, Incorporated and the Summit Women's Health Organization, Incorporated, filed this lawsuit against a number of individuals and groups who oppose abortion. The plaintiffs' second amended complaint ("complaint") alleges violations by the defendants of the Sherman Antitrust Act, 15 U.S.C. § 1 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(a), (c), and (d). The complaint also raises several pendent state claims. The district court dismissed the plaintiffs' case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *National Org. for Women v. Scheidler*, 765 F. Supp. 937, 945 (N.D. Ill. 1991). We affirmed. *National Org. for Women v. Scheidler*, 968 F.2d 612, 614 (7th Cir. 1992). The Supreme Court granted in part plaintiffs' petition for writ of certiorari to consider whether RICO sections 1962(c) and (d) require proof that either a racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. *National Org. for Women v. Scheidler*, 113 S. Ct. 2958 (1993). The plaintiffs also petitioned for review of our decision that their complaint failed to allege any violation of the

*The Honorable Bruce M. Van Sickle, District Judge of the United States District Court for the District of North Dakota, is sitting by designation.

Sherman Act. The Court denied plaintiffs' petition for writ of certiorari on the Sherman Act issue. *Id.*

The Supreme Court reversed our decision as to RICO sections 1962(c) and (d). The Supreme Court held that sections 1962(c) and (d) do not contain an economic motive requirement. *National Org. for Women v. Scheidler*, 114 S. Ct. 798, 801, 806 (1994). The Court's opinion was limited only to two of the RICO claims. The Court concluded that the plaintiffs "may maintain this action if [defendants] conducted the enterprise through a pattern of racketeering activity. The questions of whether the [defendants] committed the requisite predicate acts, and whether the commission of these acts fell into a pattern, are not before us." *Id.* at 806. The Supreme Court remanded the case to this court for further proceedings in conformity with its opinion.

As we have said, there are two RICO sections at issue in this case -- sections 1962(c) and (d). Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of *racketeering activity* or collection of unlawful debt.

18 U.S.C. § 1962(c) (emphasis added). Section 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

18 U.S.C. § 1962(d). RICO defines "racketeering activity" to include "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 (relating to interference with commerce, robbery, or extortion)." 18 U.S.C. § 1961(1)(B).

In this case, the plaintiffs' complaint alleges violations of section 1951 -- the Hobbs Act -- as the "racketeering activity" or predicate acts that give rise to a pattern of racketeering activity by the defendants. Specifically, the plaintiffs allege Hobbs Act extortion -- including attempts to commit extortion and conspiracy to commit extortion -- as the defendants' predicate acts for purposes of RICO.

Defendants contend that the plaintiffs' complaint does not allege that their actions violated the Hobbs Act. The Supreme Court expressly declined to reach the issue and expressed no opinion upon it. *Scheidler*, 114 S. Ct. at 801 n.2. We direct the district court on remand to address this issue.

As to plaintiffs' complaint, we reaffirm our original dismissal of plaintiffs' complaint as to count 1 (Sherman Act) and count 2 (RICO § 1962(a)). The Supreme Court's decision reinstates count 3 (RICO § 1962(c)) and count 4 (RICO § 1962(d)). Counts five, six, and seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367.

Also on remand, if necessary, the district court should consider which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution. *See Scheidler*, 114 S. Ct. at 806 n.6. As Justice

Souter pointed out in his concurring opinion, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.* at 807 (Souter, J., concurring). This includes Hobbs Act extortion -- the sole RICO predicate act alleged by plaintiffs in both their complaint and their RICO Case Statement.

We remand this case to the district court for further proceedings.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 86 C 7888

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly-situated clinics, Plaintiffs,

v.

JOSEPH M. SCHEIDLER; PRO-LIFE ACTION LEAGUE, INC.; RANDALL A. TERRY; ANDREW SCHOLBERG; CONRAD WOJNAR; TIMOTHY MURPHY; MONICA MIGLIORINO; VITAL-MED LABORATORIES, INC.; PROJECT LIFE; and OPERATION RESCUE, Defendants.

July 25, 1995, Decided

July 27, 1995, DOCKETED

MEMORANDUM OPINION AND ORDER

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Background

This nine-year-old case has a long and convoluted history, portions of which must be reviewed in order to understand the issues before the court. For a more detailed exposition of the facts and procedural history of this case, please refer to *NOW v. Scheidler*, ___ U.S. ___, 113 S. Ct. 2958 (1993).

In 1986, plaintiffs National Organization for Women ("NOW"), and two women's health centers brought this action against various anti-abortion activists, anti-abortion organizations, and a pathology testing laboratory. They alleged that defendants conspired to drive out of business health centers that provide abortion services. Plaintiffs contended that defendants committed extortion, engaged in physical and verbal intimidation, destroyed property, orchestrated phone campaigns to tie up clinic phone lines, made false appointments at the clinics, and disrupted the clinics' relationship with their landlords--all in violation of the Sherman Antitrust Act and sections 1962 (a), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs also raised several pendent state claims.

On May 28, 1991, the district court dismissed the Second Amended Complaint. *NOW v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). The court held the Sherman Act inapplicable to the conduct alleged in the complaint because defendants' conduct was incidental to a valid effort to influence governmental action and therefore immune. The court dismissed the § 1962(a) RICO claim because defendants'

receipt of donations from supporters was not income derived from racketeering. The § 1962(c) RICO claim was dismissed because the court concluded that RICO requires that economic motive be alleged. The RICO conspiracy count was dismissed because all substantive RICO counts failed. The state law claims were also dismissed because the dismissal of the claims based on federal law destroyed the basis for jurisdiction over the state law claims. The plaintiffs appealed.

On June 29, 1992, the Court of Appeals for the Seventh Circuit affirmed the district court's dismissal. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992). The plaintiffs sought and obtained a writ of certiorari from the United States Supreme Court limited to the question of whether a RICO violation required motivation by an economic purpose. *NOW v. Scheidler*, ___ U.S. ___, 113 S. Ct. 2958 (1993).

On January 24, 1994, the Supreme Court reversed. *NOW v. Scheidler*, ___ U.S. ___, 114 S. Ct. 798 (1994). The Court held that RICO does not require proof that either the alleged racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. In a concurring opinion, Justice Souter emphasized that although the First Amendment does not require reading an economic motive into the unambiguous RICO statute, legitimate free speech issues may be implicated in this case. Justice Souter advised that those concerns should be addressed as they arise. The defendants petitioned for a rehearing, which was denied on March 21, 1994. *NOW v. Scheidler*, 114 S. Ct. 1340 (1994).

On October 3, 1994, in an unpublished opinion, the Seventh Circuit recapitulated the Supreme Court's opinion. The Court

of Appeals directed the district court to address the issue of whether the predicate acts alleged in the complaint in fact violated the Hobbs Act (18 U.S.C. § 1951). The court specifically reaffirmed its original dismissal of the Sherman Act count and RICO § 1962(a). The court further stated:

> The Supreme Court's decision reinstated count 3 (RICO § 1962(c)) and count 4 (RICO § 1962(d)). Counts five, six, and seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367.
>
> Also on remand, if necessary, the district court should consider which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution. *See Scheidler*, 114 S. Ct. at 806 n. 6. As Justice Souter pointed out in his concurring opinion, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.* at 807 (Souter, J., concurring). This includes Hobbs Act extortion--the sole RICO predicate act alleged by plaintiffs in both their complaint and their RICO Case Statement.

NOW v. Scheidler, 25 F.3d 1053, 1994 WL 196761 **2 (7th Cir. 1994). The case was remanded to the district court for further proceedings.

Before the district court could comply with the mandate of the Court of Appeals, the plaintiffs filed a motion for leave to file a third amended complaint. On October 21, 1994, Judge

Holderman granted plaintiffs' motion and ordered plaintiffs to file an updated RICO case statement (Tr. p. 31). The Third Amended Complaint (hereinafter the "Complaint") has four counts.

Count I of the Complaint is brought by all plaintiffs[1] and alleges violations against all defendants except Vital-Med Laboratories, Inc. ("Vital-Med").[2] Count I also alleges that the defendants violated RICO by participating in the Pro-Life Action Network ("PLAN"), which the plaintiffs allege is an enterprise as defined by 18 U.S.C. § 1961(4). Several distinct predicate acts are alleged under count I. These acts include attempted arson, murder, and various Hobbs Act violations. Count II of the Complaint alleges that all defendants except Vital-Med conspired to violate the RICO Act. Count III is brought by DWHO and Summit and alleges that defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, and PLAL tortiously interfered with the plaintiffs' prospective economic advantage. Count IV is brought by Summit alone and alleges that defendant Migliorino tortiously interfered with an existing business relationship between Summit and Summit's prospective lessor. Count V is brought by DWHO and Summit

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[1]The plaintiffs in this action are: NOW, on behalf of itself and its members and others who use or may use the services of women's health centers that provide abortions, the Delaware Women's Health Organization, Inc. ("DWHO"), and Summit Women's Health Organization, Inc. ("Summit"), on behalf of themselves and similarly situated clinics.

[2]The other defendants in this action are Joseph Scheidler ("Scheidler"), the Pro-Life Action League ("PLAL"), Randall Terry ("Terry"), Andrew Scholberg ("Scholberg"), Conrad Wojnar ("Wojnar"), Timothy Murphy ("Murphy"), Monica Migliorino ("Migliorino"), Project Life, and Operation Rescue.

against only Vital-Med for breach of duty of confidentially.

This case was transferred to the undersigned by Executive Order dated November 8, 1994. On February 7, 1995, this court denied several sanctions motions and motions to reconsider the grant of leave to file a Third Amended Complaint. *NOW v. Scheidler*, 1995 WL 59228 (N.D. Ill. 1995).

Defendants now move to dismiss the Third Amended Complaint. [Docket numbers 768, 774, 776, 784, 787]. All motions are fully briefed and ripe for decision. Although the Defendants have filed separate motions and replies, the motions raise similar, though not identical, issues. To the extent possible, the court will address the various Defendants' arguments together. However, several of the arguments do not lend themselves to one coherent treatment.[3]

I. Res Judicata

Defendants make two res judicata arguments. First, they allege that NOW is barred from being a plaintiff under the Third Amended Complaint because it suffered a final dismissal of its claims under the Second Amended Complaint. Second,

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[3]It appears that the Defendants have taken advantage of their status as co-defendants and allowed one group of defendants to "carry the torch" on each individual argument thereby saving the co-defendants' limited 15-page brief space for other arguments. To the extent possible, the court will identify the parties who concur or adopt their co-defendants' positions. However, this type identification is difficult, as some defendants have endorsed their co-defendants' arguments with a single sentence. The court has addressed all meritorious arguments made by the parties, and identifies the individual defendant proponents merely to ease the task of those who will undoubtedly review the record in the future.

Wojnar argues that he has obtained a final dismissal of all claims alleged against him and, therefore, res judicata should protect him from having to further defend himself in this litigation.

Res judicata is a judicial doctrine designed to ensure the finality of judicial decisions. *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979); *Car Carriers, Inc. et al. v. Ford Motor Co. et al.*, 789 F.2d 589, 593 (7th Cir. 1986). It is a "rule of fundamental and substantial justice," *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 507 (1917); *Car Carriers*, 789 F.2d at 593, whose enforcement is essential to the maintenance of social order, "for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if . . . conclusiveness did not attend the judgments of such tribunals." *Alexander v. Chicago Park District*, 773 F.2d 850, 853 (7th Cir. 1985) (quoting *Nevada v. United States*, 463 U.S. 110, 129, 103 S. Ct. 2906, 2918 (1983)).

Res judicata, also called claim preclusion, bars the same parties or their privies from relitigating any issue that was raised in a prior judgment or could have been raised in the prior action. *Alexander*, 773 F.2d at 853; *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981); *see* Jack Friedenthal, Mary Kay Kane, Arthur Miller, *Civil Procedure* 610 (1993). As the Court of Appeals explained in *Alexander*:

> Preclusion occurs under two theories: issue preclusion and claim preclusion. Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit

> on the merits between the same parties or their privies. Plaintiffs' claims are merged in the judgment for plaintiff while judgment for defendants acts to bar any further claims by plaintiff against the defendant. It is usually referred to as res judicata . . . Issue preclusion prevents relitigation of a matter of fact of law that was previously litigated and decided. *See Jones v. City of Alton*, 757 F.2d 878, 879 n.1 (7th Cir. 1985). It is usually referred to as collateral estoppel.

Alexander, 773 F.2d at 853.

Res judicata promotes accuracy (leaving in place properly decided cases), efficiency ("it is in the interest of the state that there be an end to litigation"), and fairness ("no person should be twice vexed by the same claim"). Friedenthal, et al., *Civil Procedure* 617 (1993), *see* Robert Ziff, Note, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 Cornell L. Rev. 905, 910 (1992).

A. Legal Standard for Res Judicata

There are three threshold requirements to be considered in applying res judicata: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits. *Car Carriers*, 789 F.2d at 595 n.9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). A court must find each of these threshold requirements in order to apply res judicata as a bar.

The doctrine of res judicata is generally applied to a single "cause of action." The Court of Appeals in this circuit employs the "same transaction" test to define a "cause of action." *Car*

Carriers, 789 F.2d at 593; *Alexander*, 773 F.2d at 854; *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1241 (7th Cir. 1983). Under the same transaction test, a "cause of action" consists of a "'single core of operative facts' which would give rise to a remedy." *Car Carriers*, 789 F.2d at 593 (quoting *Alexander*, 773 F.2d at 854). The "same transaction" test is fact-oriented, and provides that once a transaction has caused injury, all claims arising from that transaction must be brought in the same suit or be lost. *Car Carriers*, 789 F.2d at 593.

B. Applicability of Res Judicata to the Parties

1. NOW

Defendants Terry, Project Life, and Operation Rescue (hereinafter the "Terry Defendants") and Defendants Scheidler, Scholberg, Murphy, and PLAL (hereinafter the "Scheidler Defendants") argue that res judicata bars NOW, and only NOW, from bringing RICO claims against them. The Terry Defendants argue that NOW suffered a final, undisturbed judgment when the Second Amended Complaint was dismissed. They argue that in the Second Amended Complaint, NOW claimed injury only under the Sherman Act and that the dismissal of the Sherman Act claims was undisturbed by the Supreme Court. Accordingly, the Terry Defendants claim that res judicata bars NOW from asserting a new claim arising from the same set of operative facts after a final decision on the merits of the original claim. Thus, they argue, under the "same transaction" test, NOW should be precluded from prosecuting the Third Amended Complaint.

The plaintiffs argue that NOW did allege RICO claims in the

Second Amended Complaint, and that those claims remain viable after the Supreme Court's reversal of the prior orders of dismissal. Thus, the first task is to determine whether NOW was a plaintiff as to the RICO counts in the Second Amended Complaint. If the answer is yes and those counts were revived by the decision of the Supreme Court, res judicata is not applicable because there has been no final decision on the merits. This determination is made difficult by the fact that not every named plaintiff made claims against every named defendant in the Second Amended Complaint.

Before turning to the specific language relied upon by the parties, a description of the layout of the Second Amended Complaint is helpful. Paragraphs one through three are contained in a subsection of the complaint titled "NATURE OF THE ACTION." Paragraph four deals with jurisdiction. Paragraphs five through eight are captioned "PLAINTIFFS." Paragraphs nine through twenty appear under a "DEFENDANTS" heading. Paragraphs twenty-one through thirty-seven describe "CLASS ALLEGATIONS." Paragraphs thirty-eight through fifty-five are captioned "FORMATION OF THE PRO-LIFE ACTION NETWORK." Paragraphs fifty-six through sixty-three explain the "CARRYING OUT OF PLAN'S AGENDA: OPERATION RESCUE." Paragraphs sixty-four through seventy-eight appear under a "THEFT OF FETAL REMAINS" caption. Paragraph seventy-nine is the beginning of the actual substantive counts of the complaint; each count realleging the facts contained in the previous paragraphs. Over half the allegations in the complaint are not contained within a "count." This makes interpretation of the complaint difficult because, as will become clear, the complaint contains both specific allegations brought by specific defendants *as well as*

general allegations which, read alone, do not always make clear which plaintiff is making the assertion.

In the first paragraphs under the RICO counts subheadings (counts II, III, and IV) the Second Amended Complaint states that the counts were brought by "plaintiffs DWHO and Summit and the class they represent." (Second Am. Compl. ¶¶ 94[4], 106,[5] 111,[6]). NOW takes the position that paragraphs one, three, twenty-two, 105, and 110 of the Second Amended Complaint support its conclusion that it was a RICO plaintiff in the Second Amended Complaint.

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[4]Paragraph 94 alleges:

> Count II is brought against the defendants Scheidler, Terry, Scholberg, Murphy, PLAL, OR, and the Project (the "RICO Defendants") by plaintiffs DWHO and Summit and the class they represent, which reallege paragraphs 1 though 78.

[5]Paragraph 106 provides:

> Count II is brought against the RICO Defendants and defendant Migliorino by plaintiffs DWHO and Summit and the class of clinics they represent, which reallege paragraphs 1 through 78, and 95 through 105.

[6]Paragraph 111 alleges:

> Count IV is brought against the RICO defendants by plaintiffs DWHO and Summit and the class of clinics which they represent, which reallege paragraphs 1 through 78, 95 through 105, and 107 through 110 above.

Paragraph one[7] outlines the law to be used to justify the relief sought: to obtain declaratory and injunctive relief. Paragraph one thus logically encompasses both the alleged RICO violations and the alleged Sherman Act violations (because both such allegations are made later in the complaint under specific counts) by stating "this is a civil action pursuant to . . . the Sherman Antitrust Act . . . [and] . . . RICO." Thus, paragraph one *does* identify NOW as a plaintiff, but not *necessarily* as a RICO plaintiff.

Paragraph three[8] is no more enlightening. This paragraph does not identify which Count it refers to and does no more than explain that NOW believed it had organizational standing to sue under the Sherman Act *(see infra).* Nothing in the paragraph could be logically construed to support plaintiffs' allegation that NOW was a RICO plaintiff.

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[7]Paragraph one provides:

> This is a civil action pursuant to section 16 of the Clayton Act. 15 U.S.C. Section 26, and section one of the Sherman Antitrust Act, 15 U.S.C. Section 1; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1692; and state law. Plaintiffs seek declaratory and injunctive relief and damages from defendants who have conspired, among themselves and with others to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity.

[8]Paragraph three states:

> The National Organization for Women ("NOW") sues on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and other women who use or may use the services of such centers.

Paragraph twenty-two,[9] though lengthy, provides no additional support for the plaintiffs' position. The paragraph appears under a "Class Allegations" subdivision of the complaint and tracks the requirements of organizational standing. *See infra* at 31. Indeed, the paragraph states that NOW wishes to represent the class in order to obtain declaratory and injunctive relief. That form of equitable relief was only requested under the Sherman Act count of the Second Amended Complaint.

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[9]Paragraph twenty-two provides:

> Plaintiff NOW brings this action on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and all other women who use or may use the services of such health centers. NOW's women members who use or may use the services of women's health centers that perform abortions have standing in their own right, the interest NOW seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual NOW members in the lawsuit. Furthermore, there is a close relationship between the interests of NOW and the interests of other women who are not NOW members who use or may use the services of women's health centers that perform abortions, and the ability of such women to represent themselves is limited. Finally, in the case of both the class of NOW's women members who use or may use the services of women's health centers that perform abortions and the class of women who are not NOW members but who use or may use the services of such health centers, the class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law and fact common to the class; NOW will fairly and adequately protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Paragraph 105[10] is part of count II which alleges violations of RICO section 1962(a). The section 1962(a) count of the Second Amended Complaint was not reinstated by the Seventh Circuit or the Supreme Court. Count II states that it is brought "by plaintiffs DWHO and Summit and the class they represent . . . "(Second Am. Compl. ¶ 94). However, paragraph 105 does plainly state that "the RICO Defendants' activities have injured the plaintiff class of female NOW members. . . " Paragraph 110[11] is part of court III, alleged under RICO section 1962(c), and incorporates the injuries in paragraph 105. Count III was

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[10]Paragraph 105 states:

> Specifically, the RICO Defendants' activities have decreased the business of, and/or increased the cost of doing business at DWHO, Summit, and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the rights to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.
>
> WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action; award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

[11]Paragraph 110 provides:

> As a result of each defendant's violation of 18 U.S.C. Section 1968(c) [sic], plaintiffs have suffered the injuries described supra in paragraphs 104-105.
>
> WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

also stated to have been brought by "plaintiffs DWHO and Summit and the class of clinics they represent. . ." (Second Am. Compl. ¶ 106). Although the section 1962(a) claims in count II were not reinstated, count III (the section 1962(c) claim) was reinstated. By asserting that NOW and its members have been injured by violation of section 1962(c), NOW asserted status as a RICO plaintiff. Although not specifically stating that it brought RICO claims in paragraphs 106 and 111, NOW did plead specific facts and injury sufficient to state a claim for relief under both sections 1962(c) and (d) because it alleged the conduct that violated the statute and that NOW was injured by that conduct. *See Luckett v. Rent-A-Center, Inc.*, 53 F.3d 871 (7th Cir. 1995); *La Porte County Republican Central Comm. et. al. v. Bd. of Comm'rs of La Porte*, 43 F.3d 1126 (7th Cir. 1994); *Mid-American Title Co. v. Kirk*, 991 F.2d 417, 422 (7th Cir. 1993); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir.1992). NOW did all that is required to state a claim under RICO section 1962(c) and (d) in the Second Amended Complaint; it stated that it had been injured because of the defendants' actions that violated RICO.[12] Therefore, NOW is not barred from making RICO allegations in the Third Amended Complaint because it made the same allegations, albeit less elaborately and eloquently, in the Second Amended Complaint. This interpretation gives a reasonable interpretation to both the allegations contained in paragraph 94 and 106 (which are alleged by DWHO and Summit) as well as paragraphs 105 and 110 (which include NOW as an injured party, and therefore as a party making a claim under the count).

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[12]The Supreme Court's statement in dicta that "only DWHO and SWHO [Summit], and not NOW, have sued under RICO." *NOW v. Scheidler*, 114 S. Ct. at 802, is not to the contrary.

See Restatement (Second) Contracts § 203(a) (year) ("an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). NOW was a RICO plaintiff in the Second Amended Complaint, and it will be allowed to continue in that vein in the Third Amended Complaint.

2. Wojnar's Res Judicata Argument Against All Plaintiffs

Defendant Conrad Wojnar argues that res judicata operates to bar all Plaintiffs from bringing RICO claims against him. Wojnar claims that in the Second Amended Complaint he was charged only with violations of the Sherman Act antitrust count (count I) and under pendent state law. Because the dismissal of the Sherman Act claims was left undisturbed, Wojnar concludes that res judicata bars the prosecution of the Third Amended Complaint's RICO allegations, as to him.

Plaintiffs argue that because the preclusive effect of res judicata is only available where a final judgment has been entered, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979), the doctrine is not available to Wojnar because the dismissal was reversed. Furthermore, the Plaintiffs argue that because the Wojnar was a defendant as to a state law claim under the Second Amended Complaint, Wojnar has not suffered a final dismissal and therefore no final judgment has been issued against him.

The court will analyze Wojnar's res judicata argument using the standard set forth above of identity of parties, identity of

causes of action, and finality of judgment. *Car Carriers*, 789 F.2d at 595 n.9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982).

a. Identity of the Parties

The first prong in the analysis of whether res judicata applies is whether the parties in the first and second actions are identical. *Car Carriers*, 789 F.2d at 595 n.9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). The identity of the parties is not in dispute; the parties are identical for the purposes of this motion.

b. Identity of Causes of Action

The second prong of the analysis is whether the causes of action in the first and second actions are identical, under the "same transaction" test as defined by the Seventh Circuit. *Car Carriers*, 789 F.2d at 595 n.9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). If the causes of action arise out of the "same transaction," the suits are identical for purposes of res judicata. *Id.* There is no serious contention that the claims against Wojnar in the Second Amended Complaint and those in the Third Amended Complaint do not arise from the same set of operative facts.

c. Final Judgment on the Merits

The third requirement for application of res judicata is that there have been a final judgment on the merits. It would appear that this requirement has been met, but Plaintiffs suggest otherwise. In count I of the Second Amended Complaint,

Plaintiffs claimed that Wojnar violated the Sherman Act. The same conduct asserted to have violated the Sherman Act is now claimed to violate RICO. The Sherman Act count of the Second Amended Complaint was dismissed by the district court. *NOW v. Scheidler*, 765 F. Supp. at 937. That dismissal was affirmed by the Court of Appeals. *NOW v. Scheidler*, 968 F.2d at 612. It is not clear whether Plaintiffs included the dismissal of the Sherman Act count in their petition for certiorari to the Supreme Court, but it is clear that the Supreme Court did not grant certiorari on that issue. Thus, after the Supreme Court's decision in this case, the Court of Appeals reminded us that the Sherman Act claims were dismissed. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 *2. Thus, it would seem, there has been a final judgment for res judicata purposes. Alas, nothing in this case is that simple.

Included in the Second Amended Complaint was also count V against Wojnar alleging "tortious interference with prospective economic advantage" under state law.[13] It was alleged that the district court had supplemental jurisdiction over that and other state law counts. After the remand from the Supreme Court, the Court of Appeals stated that "counts five, six, seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367." *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 *2. Plaintiffs seize upon that language to argue that if the state law claims survive and this court retains jurisdiction over them, then there could not have been a final judgment on the merits for res judicata purposes. There are several things

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[13]Wojnar was named as a defendant in only counts I and V of the Second Amended Complaint.

wrong with Plaintiff's position: First, the quoted statement by the Court of Appeals is dicta; second, once the order of dismissal of Count I became final, this court ceased to have jurisdiction over count V of the Second Amended Complaint; and third, Plaintiffs misconstrue the operation of res judicata in this circumstance. Count I of the Second Amended Complaint stated a claim as to which this court had federal question jurisdiction. Count V stated a claim as to which this court had supplemental jurisdiction because of its relationship to the issues raised in count I; what was previously called "pendent claim" jurisdiction. *Finley v. United States*, 490 U.S. 545, 548, 109 S. Ct. 2003, 2006 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966); *Hurn v. Oursler*, 289 U.S. 238, 53 S. Ct. 586 (1933); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 29 S. Ct. 451 (1909)). Count I was dismissed because the district court concluded that the Sherman Act was not applicable to the conduct alleged in the Second Amended Complaint. Res judicata should bar the Plaintiffs from now amending the complaint to allege a new (RICO) theory in connection with the same alleged conduct without regard to whether there remain unresolved state law claims. A brief example demonstrates why this is so. If the allegations against Wojnar contained in count V had been made in a separate state complaint rather than in the same (federal) complaint as count V, and the federal claim had been dismissed, there is no logical reason why res judicata should not bar Plaintiffs from filing a new federal complaint asserting a different (federal) legal theory as to Wojnar, but based upon the same operative facts. In the example, the existence of the state claim is irrelevant to the question of whether res judicata should apply to the federal claim.

Plaintiffs claims against Wojnar are barred by res judicata and will be dismissed.

II. Supplemental, Ancillary, or Pendent Jurisdiction Over Vital-Med

Vital-Med alleges that its motion to dismiss should be granted because although there was a basis for federal jurisdiction under the Second Amended Complaint, there is no such basis under the Third Amended Complaint. In the Second Amended Complaint, Vital-Med was a defendant under count I (Sherman Anti-Trust Act) and count VII (breach of a duty of confidentiality allegedly owed to DWHO and Summit). Count I was dismissed by the district court, affirmed by the Court of Appeals, and not considered by the Supreme Court. The Third Amended Complaint names Vital-Med as a defendant only in count V alleging a breach of a duty of confidentiality owed to DWHO and Summit. Vital-Med contends this court should dismiss count V of the Third Amended complaint because there is no federal question or diversity jurisdiction, and the court has no basis for exercising supplemental, pendent, or ancillary jurisdiction pursuant to 28 U.S.C. § 1367(a) ("Section 1367"). Plaintiffs contend that this court has supplemental jurisdiction over Vital-Med because federal jurisdiction was never lacking, and therefore the pendent state law claim under which Vital-Med is sued in the Third Amended Complaint is proper pursuant to 28 U.S.C. § 1367. Vital-Med contends that section 1367 does not apply to this case because it was commenced before the statute's effective date.

As the only claim against Vital-Med is stated under state law, it is clear that claim is not supplemental to any federal claim.

Cf. 28 U.S.C. § 1367(a).

A. Applicability of 28 U.S.C. § 1367

By its own terms, section 1367 provides for supplemental jurisdiction in the federal courts "[and] *shall apply to civil actions commenced on or after* the date of the enactment of this Act. [Dec. 1, 1990]." 28 U.S.C. § 1367 note (1990) (emphasis added). Section 1367 provides that once a district court has original jurisdiction over one claim in any civil action, that same court may adjudicate "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367.

This case was originally filed on October 17 1986. An amended complaint was filed on February 3, 1989. [Docket number 155]. The Second Amended Complaint was filed on September 25, 1989. [Docket number 236]. Vital-Med was first named as a defendant in the Second Amended Complaint, in 1989. Vital-Med contends that, for section 1367 purposes, the case against them was filed in either 1986 or 1989, and therefore the statute does not apply to them. Thus, Vital-Med maintains that the court should look to pre-1990 law to determine whether it has jurisdiction over it and count V.

The Plaintiffs disagree, relying upon the opinion of the Court of Appeals that "counts five, six, and seven, which allege violations of state law, survive . . . pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367." *NOW v. Scheidler*, 25 F.3d 1053 (7th Cir. 1994). Plaintiffs argue that because the Court of Appeals relied on section 1367, at least in

part, in reinstating the state law count against Vital-Med, that this court should allow the claim to survive.[14]

This case has been in existence since 1986, and Vital-Med has been a defendant since 1989. No matter which date is the date on which the action was "commenced" for purposes of section 1367, both are before December 1, 1990, which is the date after which, by its own terms, section 1367 *"shall apply to civil actions commenced* [thereafter]." Therefore, section 1367 does not apply, and the court must look to the law of supplemental jurisdiction as it existed before section 1367 was enacted.

B. History of Supplemental Jurisdiction

In contrast to state courts, federal courts are forums of limited jurisdiction, possessing only the power to hear those cases enumerated in Article III of the United States Constitution and only to the extent authorized by Congress. U.S. Const. Art. III § 2; Friedenthal, et al., *Civil Procedure* 64 (1992). It is fundamental that "as regards all courts of the United States inferior to this tribunal, two things are necessary to create

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[14]The law of the case might come into play here, as the Seventh Circuit relied, with the intermediary signal "see" on section 1367. *See United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986); *United States v. South*, 28 F.3d 619, 629 (7th Cir. 1994); *Williams v. Commissioner of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993). However, this court need not follow the letter of the Seventh Circuit's ruling and assume, without analysis, that section 1367 applies because of the "see" signal. *A Uniform System of Citation* 23 (15th ed. 1991). The Court of Appeals was not relying directly on section 1367, rather, it was directing the reader's attention to the statute to show the general legal theory supporting its conclusion that the counts were to be reinstated. *See id.*

jurisdiction, . . . the Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* . . . to the extent that such action is not taken, the power lies dormant." *Finley v. United States*, 490 U.S. 545, 547, 109 S. Ct. 2003, 2006 (1989) (quoting *The Mayor v. Cooper*, 73 U.S. 247, 6 Wall. 247, 252 (1868)). Originally, this meant that federal courts could not exercise jurisdiction over non-federal claims or issues that were closely related to federal claims. However, federal judges managed to accommodate the need to exercise jurisdiction over non-federal claims, and two forms of federal jurisdiction developed, ancillary and pendent jurisdiction. Friedenthal, et al., *Civil Procedure* 64 (1992).

Originally, ancillary jurisdiction was used to allow federal courts to adjudicate claims to property where the ownership of that property was otherwise properly being litigated in federal court. *Freeman v. Howe*, 65 U.S. (24 How.) 450 (1860); 13 Wright, et al., *Federal Practice and Procedure* § 3523 (1984). Before 28 U.S.C. § 1367 was enacted, the Federal Rules of Civil Procedure used a "transaction and occurrence" standard for compulsory counterclaims and cross-claims, thereby allowing ancillary jurisdiction over these claims. 13 Wright, et al., *Federal Practice and Procedure* § 3523 (1984).

Pendent jurisdiction was developed by the Supreme Court in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), when Justice Marshall declared that a federal court of original jurisdiction should have the power to decide all the questions that a case presented and the court needed to decide in order to function effectively. *Osborn*, 22 U.S. (9 Wheat.) at 823. As the doctrine matured, pendent jurisdiction was most commonly exercised when a plaintiff brought a federal question

claim and sought to have a related state law claim against the same defendant adjudicated before the federal court. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S. Ct. 468 (1959) (Jones Act claim provides pendent jurisdiction for maritime claim that, by itself, could only be asserted on the admiralty side of federal court.). This was called "pendent claim" jurisdiction.

"Pendent party" jurisdiction was "jurisdiction over parties not named in any claim that is independently cognizable by the federal court." *Finley v. United States*, 490 U.S. 545, 550-51, 109 S. Ct. 2003, 2007-08 (1989). *Finley* expressly stated that where federal courts were asked to assert pendent party jurisdiction, "as opposed to the addition of only claims, we will not assume that the full congressional power has been congressionally authorized, and will not read jurisdictional statutes broadly." *Finley*, 490 U.S. at 549, 109 S. Ct. at 2007. Thus, pendent party jurisdiction is generally not available unless the statute expressly authorizes it. *See id.* "Pendent claim" jurisdiction, by contrast,

> exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .' U.S. Const. Art III. § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'

United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130 (1966); *see also Finley*, 490 U.S. at 563-64, 109 S. Ct. at 2015 (Stevens, J., dissenting).

1. Application to Vital-Med

Plaintiffs contend that the issue before the court is whether Count V against Vital-Med is a proper pendent *claim*, while Vital-Med argues that the issue is whether the court has pendent *party* jurisdiction.

It is clear from the description of the various types of supplemental jurisdiction that existed prior to the enactment of section 1367 that any jurisdiction over plaintiffs' claim against Vital-Med depends upon an assertion of pendent *party* jurisdiction. *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413 (1976) (plaintiff was unable to bring state law claims against a completely new party although the claims arose out of the same transaction and occurrence which gave rise to the plaintiff's federal claims). Vital-Med is not a defendant under any of the federal counts in the Third Amended Complaint. Plaintiffs have not asserted that Vital-Med is diverse from the plaintiffs.

Therefore, the court will grant Vital-Med's motion to dismiss count V of the Third Amended Complaint and Vital-Med as a defendant for lack of jurisdiction.[15] *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413 (1976); *see also Kreuzfeld A.G. et al. v. Carnehammar et al.*, 138 F.R.D. 594, 608-09 (S.D.Fla. 1991) (following *Finley* and dismissing a non-diverse, non-federal

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[15]Vital-Med's argument regarding the inapplicability of the doctor-patient privilege to their relationship with the plaintiff clinics is therefore moot.

claim defendant in a case brought before section 1367 was enacted).

2. Application to Wojnar

As stated above, any attempt to assert a new (RICO) claim against Wojnar is barred by res judicata. Therefore all that is left are the state law claims against him. These claims can only be pendent party claims and the reasoning applicable to Vital-Med are equally applicable to Wojnar. *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130 (1966). The state law claims against Wojnar will also be dismissed. *Id.* The court now turns to the merits of the motions to dismiss for failure to state a claim.

II. Failure to State A Claim

The Defendants allege various theories why the Third Amended Complaint fails to state a claim upon which relief may be granted. Defendants argue that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted if the complaint does not state a cause of action upon which relief may be granted. *Corcoran v. Chicago Park Dist.*, 875 F.2d 609, 611 (7th Cir. 1989). The facts as alleged below are viewed in the light most favorable to the Plaintiffs for the purpose of determining the Defendants' motions to dismiss. *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). Unless it appears beyond doubt that Plaintiffs can prove no facts which would entitle them to relief, the Court must deny the motion. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Mid-*

America Title Co. v. Kirk, 991 F.2d 417, 419 (7th Cir.), *cert. denied*, 114 S. Ct. 346 (1993). However, the court need not strain to find inferences favorable to Plaintiffs which are not apparent on the face of the complaint. *Coates v. Illinois St. Bd. of Educ.*, 559 F.2d 445, 447 (7th Cir.1977). Similarly, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. *Nelson v. Monroe Regional Medical Ctr.*, 925 F.2d 1555, 1559 (7th Cir. 1991).

The factual allegations of this case will be outlined generally. Plaintiff NOW is a nationwide, non-profit organization dedicated to "advancing and protecting the legal rights of women. (Complaint ¶ 7). DWHO is a Florida corporation with its principal place of business in Delaware. (Complaint ¶ 8). Summit is a partnership with its principal place of business in Delaware. (Complaint ¶ 9). Plaintiffs allege that all the defendants except Vital-Med[16] are involved in an "enterprise," as defined in 18 U.S.C. § 1961(4). This enterprise, called the Pro-Life Action Network ("PLAN") engages in or affects interstate commerce. According to the complaint, PLAN's common purpose is to use racketeering activity to drive out of business all clinics that provide abortion services. PLAN's activities are distinct from the pattern of racketeering activity engaged in by each defendant.

Defendants Scheidler, Terry, Scholberg, Murphy, Migliorino,

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[16]Vital-Med will be dismissed from this case pursuant to this memorandum opinion.

Wojnar[17] and the Pro-Life Action League ("PLAL") are each persons under 18 U.S.C. § 1961(3), and are associated with PLAN by virtue of their involvement with its annual conventions as speakers and in other leadership capacities. No later than 1987, Scheidler and Terry sat on PLAN's leadership council. (Complaint ¶¶ 11-12). Migliorino has been a featured speaker at one or more PLAN conventions. (Complaint ¶ 16). Scheidler, Scholberg, Wojnar, Murphy, PLAL, and Vital-Med are residents of Illinois. (Complaint ¶¶ 11, 13, 14, 15, 17, 18). Migliorino is a Wisconsin resident. (Complaint ¶ 16). Terry and Project Life are New York residents. (Complaint ¶¶ 12, 20). Defendants PLAL, Operation Rescue ("OR") and Project Life are each persons under the RICO statute, are associated with PLAN, and participate in PLAN by being its member groups. Since 1984, Vital-Med or its predecessor has provided pathology testing and other services to DWHO, Summit, and their affiliated clinics. (Complaint ¶ 17).

PLAL's business consists of using racketeering activity to disrupt clinics that perform abortions. (Complaint ¶ 18). Scheidler has been the director of PLAL. (Complaint ¶ 11). Scholberg was the assistant director of PLAL from February, 1988 until approximately 1990. (Complaint ¶ 13). Murphy has been a paid employee of PLAL since September, 1988, and he worked as a volunteer for PLAL before that date. (Complaint ¶ 15). Terry has been the executive director of Project Life and was the national organizer of Operation Rescue. (Complaint ¶ 12).

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[17]Wojnar will be dismissed from this case pursuant to this memorandum opinion.

OR's business consists of using racketeering activity to disrupt and close clinics that perform abortions. OR has, through Terry and other agents and co-conspirators, engaged in racketeering activity within this district. (Complaint ¶ 19).

Project Life has engaged in racketeering activity in this district through PLAN, Terry, and other agents and co-conspirators. (Complaint ¶ 20).

Plaintiffs allege that the Defendants committed the following predicate acts of racketeering, including acts and/or threats of: (1) extortion against clinic personnel, patients, and suppliers of goods; (2) murder of clinic personnel, including doctors and their families; (3) kidnapping of clinic personnel, including doctors and their families; and (4) arson of clinics that provide abortion services; (4) taking possession of interstate shipments of fetal remains with intent to convert the remains to their own uses; (5) obstruction of interstate commerce by extortion and/or threats to commit extortion and/or the commission or threat of physical violence to persons and property; and (6) travel in interstate commerce and the use of facilities in interstate commerce with intent to commit crimes of violence to further acts of extortion and/or arson, and/or to promote, manage, establish, or facilitate the promotion, management, establishment of extortion or arson. (Complaint ¶ 2).

A. Proximate Cause and Standing

1. Standing

a. DWHO and Summit

The Terry Defendants allege that DWHO and Summit lack the necessary "proximate causation" and standing to bring both 18 U.S.C. § 1962(c) ("substantive RICO") and (d) ("RICO conspiracy") charges against them.

The plaintiff clinics argue that in addition to defendants' conduct at the plaintiff clinics the Defendants' "threats and acts of nationwide violence" satisfy the requirements of standing and proximate cause for the substantive RICO and RICO conspiracy claims. Defendants maintain that Plaintiffs' allegations regarding "illegal anti-abortion activities elsewhere [at clinics other than DWHO and Summit]" are insufficient to show proximate cause.

RICO's standing provision for civil cases, 18 U.S.C. § 1964(c), provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Thus, to have standing to assert claims for either substantive RICO or RICO conspiracy violations, a plaintiff must be injured in her "business or property" due to the violation.

The seminal case on RICO standing and proximate causation is *Holmes v. S.I.P.C.*. There, the Supreme Court concluded that under § 1964(c), the plaintiff need not be *directly* injured by the defendants. Rather, common law principles of proximate cause apply. *Holmes v. S.I.P.C.*, 503 U.S. 258, 112 S. Ct. 1311, 1318.

The requirement that there be proximate cause bars a plaintiff from recovering where her injury flowed "merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* (citing 1 J. Sutherland, *Law of Damages* 55-58 (1882)). In *Holmes*, the Supreme Court concluded that plaintiff Securities Investor Protector Corporation ("SIPC") did not have standing to sue a broker-dealer under RICO despite SIPC's claim that it had the subrogated rights of the broker-dealer's customers because the link between the alleged stock manipulation which caused the injury and losses to the nonpurchasing customers was too contingent on the broker-dealer's inability to pay the claims and was therefore too remote to be the proximate cause of the customers' injuries.

However, in this case, the Supreme Court has already noted that the Second Amended Complaint made sufficient allegations to confer standing. *NOW v. Schiedler*, 114 S. Ct. at 803. The plaintiff clinics alleged in the Second Amended Complaint that (1) the defendants conspired to use force to induce clinics staff and patients to stop working and obtaining services elsewhere; and (2) that the conspiracy injured the business and/or property interests of the plaintiffs. *Id.* The Court stated that in light of the limited requirement that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific allegations that are necessary to support the claim," *Id.* (quoting *Lujan*, 504 U.S. 555, 112 S. Ct. 2130, 2137.), "nothing more is needed to confer standing . . . at the pleading stage." *Id.*

The following allegations are set forth as examples that show injury to the Plaintiffs and that have been connected to each of

the specific defendants:

1. Attempted and actual extortion committed by Scheidler on April 11, 1986 when he threatened DWHO's clinic administrator with "reprisals" if she refused to quit her job at the clinic. (Complaint ¶ G). [This allegedly harmed DWHO because it caused the clinic to lose personnel and be forced to retrain a new administrator. It allegedly harmed NOW's members because it hampered their ability to transact business with the clinic, and may have increased the cost of obtaining DWHO's services.]

2. Attempts, conspiracies to commit and the commission of extortion and/or physical violence by Operation Rescue when it organized a "National Day of Rescue" on October 29, 1988, and blocked access to clinics in forty cities and attempted to force the clinics to close. (Complaint ¶ I(4)). [This allegedly harmed the plaintiffs because, reading the complaint in the light most favorable to the plaintiffs, the activities surrounding the National Day of Rescue was committed against both Summit and DWHO. This, in turn, caused the plaintiff clinics to lose business that day, and NOW's members to be unable to transact business with the target clinics on that day.]

3. Attempts, conspiracies to commit and the commission of extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL and "others" against DWHO and Summit by conspiring to steal, stealing, and hiding interstate shipments of fetal specimens. (Complaint ¶ J(1)). [This harmed both DWHO and Summit by interfering with their business relations with Vital-Med.]

4. Scheidler, Murphy, PLAL, and "others" threatened to disclose private information about the patients of the plaintiff clinics in connection with the theft of the fetal remains. This was done in order to interfere with the actual or prospective business relations with the plaintiff clinics. (Complaint ¶ J(2)). [The clinics argue that Defendants' actions harmed their business relationship with potential and current patients because the patients' confidential medical information could be revealed by Defendants.]

5. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and "others" against doctors working with "clinics affiliated with DWHO and Summit" by disclosing the names of the doctors who worked at the clinics. Defendants disclosed those names to induce fear in the doctors and force them (and the clinics who employed them) to forego the economic benefits of their business relations. (Complaint ¶¶ 87(K)-87(L)). [The clinics argue that this disclosure harmed the clinics business, and NOW's ability to transact business with the clinics and the doctors practicing at those clinics.]

6. Migliorino forced Summit's new lessor to breach its lease with the clinic by threatening to disrupt and harass the other tenants if Summit were allowed to move into the building. (Complaint ¶¶ 80-81). [This harmed Summit by having to incur the expense of finding a new location and, Plaintiffs allege, increased rental costs.]

7. Migliorino, Murphy, Wojnar, and Scheidler have used the telephone and mail to intimidate and harass clinics in at least six states. (Complaint ¶ 35). [Causing harm to the

target clinics (DWHO and Summit are not alleged to be targets of this activity) by violating the Hobbs Act and causing intimidation and harassment as well as increasing staff turnover, and increasing costs by requiring higher salaries to keep staff at the plaintiff clinics].

8. Terry was the executive director of Project Life and was the national organizer of Operation Rescue. Terry also served on the leadership council of PLAN and conspired with others in PLAN to close clinics through force and violence. (Complaint ¶ 12). Operation Rescue and Project Life, in turn, executed over on hundred violent blockades of clinics that performed abortions. Terry participated in these blockades. (See Complaint ¶¶ 60-66). [This harmed the target clinics by interfering with their business relationships with patients and employees. Plaintiffs also argue that the blockades force the target clinics to give up property rights. None of these blockades were alleged to have occurred at the plaintiff clinics' premises. However, the conspiracy to close clinics through violence could arguably affected the plaintiffs because they are clinics that perform abortions and are therefore in the class of clinics targeted by PLAN.]

9. Scholberg conspired with others at PLAN conferences and "mini-conferences" to close clinics through force and violence and participated in several violent clinic blockades (at several of which Scholberg was arrested), although none of the blockades were at either of the plaintiff clinics. (Complaint ¶¶ 53, 55, 58). [Plaintiffs allegedly were injured by Scholberg's participation in the planning and conspiring to close clinics through force and violence.]

Thus, the allegations under the Third Amended Complaint alleges sufficient facts to satisfy general standing requirements, which is all that is required at the pleading stage. *NOW v. Scheidler*, 114 S. Ct. at 803; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2136 (1992); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

b. NOW

NOW presents a special standing problem. The Scheidler Defendants allege that NOW lacks organizational standing to bring the claims under the Third Amended Complaint. Generally, an injured party must assert her own legal rights and interests and cannot rest her claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. at 499, 95 S. Ct. at 2205; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 600 (7th Cir. 1993). However, in certain circumstances, an association may have standing solely as the representative of its members. *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 600; *Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380 n.3 (7th Cir. 1987) (citing cases). The landmark case for associational, or organizational, standing is *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434 (1977). The *Hunt* test is as follows:

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires

the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343, 97 S. Ct. at 2441. Nonetheless, the possibility of representational standing does not "eliminate or attenuate the constitutional requirement of a case or controversy." *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *see Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361 (1972). The *Hunt* test was recently reaffirmed in *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 106 S. Ct. 2523 (1986), where the Court specifically noted that very often an organization will present an especially efficient vehicle for litigation from the perspective of both the litigants and the judicial system. *Brock*, 477 U.S. at 289, 106 S. Ct. at 2532. The Court continued, "[a] preexisting organization can often draw upon a preexisting reservoir of experience, research, and capital. These resources . . . can often sharpen the presentation of issues appreciably--one of the primary concerns of the doctrine of standing." *Retired Chicago Police Ass'n*, 7 F.3d at 600 (citing *Brock*); *see Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187, 71 S. Ct. 624, 656 (1951) (Jackson. J. concurring).

The first prong of the *Hunt* test is the ability of the members of the association to sue in their own right for the alleged injury. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. The Scheidler Defendants maintain, without citing authority, that NOW does not meet the first prong of this test because "only those NOW members injured in their 'business or property' would have standing to sue under RICO." Plaintiffs argue, however, that "the [Third Amended] Complaint has alleged direct inference with NOW

members' business and property rights sufficient to meet the first *Hunt* element. *See* ¶¶ 4, 5; *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 351 (7th Cir. 1992)". (Response p.20 n.6).

This court has been given some guidance from the Supreme Court in its opinion reversing the dismissal of this case. *NOW v. Scheidler*, 114 S. Ct. at 803. The Court emphasized that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2137 (1992). The Court concluded that DWHO and Summit had claimed sufficient injury to their business and/or property interests to confer standing on both of the clinics. *Id.* However, alleging injury is not enough; RICO requires the complaining party to have been "injured [in her] business and/or property interests" in order to establish standing. 18 U.S.C. § 1964(c). Mindful of Congress' broad remedial purposes in enacting RICO, courts have interpreted the phrase "business or property" to mean only commercial interests, as distinct from personal interests such as pain and emotional suffering. *See, e.g., Doe v. Roe et al.*, 958 F.2d 763 (7th Cir. 1992) (value of client's sexual activity, allegedly performed for attorney to pay legal fees incurred in divorce proceeding was not "business or property" for purposes of RICO); *Rylewicz v. Beaton Svcs.*, 888 F.2d 1175, 1180 (7th Cir. 1989) (the terms "business or property" are words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom); *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783 (9th Cir. 1992) (personal injuries, such as diminution of enjoyment of apartment suffered by tenant as result of alleged drug racketeering in neighboring apartment, not compensable under

RICO); *Van Schaick v. Church of Scientology of Cal. Inc.*, 535 F. Supp. 1125, 1137 (D.Mass.1982); *Savastano v. Thompson Medical Co.*, 640 F. Supp. 1081, 1087 (S.D.N.Y.1986).

The Supreme Court has focused this court's interpretation of the "business or property" language. The Court found standing under the Second Amended Complaint because of allegations that the Defendants "conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere." *NOW v. Scheidler*, 114 S. Ct. at 803.

The Third Amended Complaint alleges that NOW's members have been harmed by the Defendants' blockades, threats, and destruction because women members are unable to avail themselves of a commercial relationship; the ability to transact business with the clinics. This type of injury does indeed implicate the right to transact legal business. Moreover, this type of injury is clearly *not* the kind of injury for which courts have barred recovery under RICO--it is not a "personal" injury such as pain, suffering, or humiliation. Therefore, NOW's women members would have a right to sue in their own capacities. Thus, the first prong of the *Hunt* test is satisfied.

The second prong of the *Hunt* test is whether the interests that the organization seeks to protect or enforce are germane to the organization's purpose. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. NOW's organizational purpose is "advancing and protecting the legal rights of women." The Defendants contend that because NOW's purpose is not abortion-specific, it may not maintain standing to prosecute this suit. Plaintiffs maintain, however, that NOW seeks to ensure reproductive freedom, which it contends is

"unquestionably germane" to NOW's organizational purpose. Plaintiffs argue, moreover, that it is not necessary that the organization's sole purpose relate to the issue being litigated. Plaintiffs are correct. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441 (interests sought to be protected must be "germane to the organization's purpose"); *Brock*, 477 U.S. at 287, 106 S. Ct. at 2531 (same, *quoting Hunt*). Ensuring the right to abortions is a germane interest to NOW's purpose of protecting the legal rights of women. The fact that some do not share NOW's view that ensuring access to abortion services advances and protects the legal rights of women does not diminish the existence of the right or the validity of NOW's interpretation of its goals. Since *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), the Supreme Court has recognized a woman's right to have an abortion under certain circumstances without undue interference by the state. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972 (1990). To the extent that the Third Amended Complaint alleges that that legal right is or has been hampered or threatened by Defendants, it conforms with NOW's purpose of protecting women's rights sufficiently to meet the second prong of the *Hunt* test.

The final prong of the *Hunt* test is whether the claim asserted or the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. Defendants contend that NOW cannot satisfy this prong of the test because individual members will have to participate in the suit to prove the damages that they actually suffered. Plaintiffs

argue that individual members will not have to participate in the suit because NOW does not seek damages under the Third Amended Complaint, rather, it seeks injunctive relief for its members. Therefore, NOW argues, there is no need for individual participation in the suit.

NOW sues only for injunctive relief. The only potential recipients of treble damages would be DWHO, Summit, and any possible class of clinics that they might represent. Thus, there would be no need for individual NOW members to establish pecuniary loss. NOW need only show, at the pleading stage, that some members would benefit from the injunctive relief requested. *Warth v. Seldin*, 422 U.S. at 515, 95 S. Ct. at 2213 ("the remedy, if granted, will inure to the benefit of those members of the association actually injured"); *Brock*, 477 U.S. at 288, 106 S. Ct. at 2531-32; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 601. It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate *Hunt*'s third prong. NOW has standing to sue as an association.

2. Requirement of Predicate Act as Proximate Cause

Defendants contend that even if there is standing and general proximate cause, Plaintiffs should not be allowed to prosecute this case because their injuries do not arise out of predicate acts under RICO. Plaintiffs contend that the injuries need not arise out of predicate acts, as long as the injuries arise out of acts in furtherance of the conspiracy.

The RICO statute prohibits persons engaged in an interstate

"enterprise" from conducting that enterprise's affairs through "a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" means either any act or threat of violation of several, enumerated felonious state crimes or any act which is punishable under several enumerated federal statutes. 18 U.S.C. § 1961(1). These enumerated activities are called "predicate acts." The "pattern" requirement is satisfied if the defendant commits at least two predicate acts within a ten year period (excluding any time spent in prison). 18 U.S.C. § 1961(5).

The circuits are split on the issue of whether a predicate act must be the proximate cause of the injury. The Seventh Circuit is in the group that does not require that the injury flow from a predicate act.[18] *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169-70 (3d Cir. 1989) (injury from overt act that furthers RICO conspiracy is sufficient to confer

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[18] *Cf.* Cases in which RICO standing was denied are generally those in which an employee-plaintiff did not allege a sufficient nexus between the alleged predicate acts committed by the employer and her termination. *See, e.g., Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir. 1990) (plaintiff who raised RICO charges in a wrongful discharge suit lacked standing under RICO because the plaintiff was the victim of an alleged wrongful discharge and not of any predicate act under RICO); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151 (6th Cir. 1990) (plaintiff who alleged wrongful discharge after reporting the employer's scheme to ship defective products lacked standing to assert a RICO claim because the predicate acts of racketeering were not the cause of the alleged injury); *Flinders v. Datasec Corp.*, 742 F. Supp. 929 (E.D.Va. 1990) (plaintiff who was terminated after threatening to expose a kickback scheme lacked standing because his termination was not an injury caused by the racketeering acts). Obviously, these cases are distinguishable based on subject matter of the dispute. However, this court need not go through that analysis because the Seventh Circuit has adopted an alternative approach.

standing, even if overt act is not a predicate act of racketeering); *see Reddy v. Litton Indus., Inc.*, 502 U.S. 921, 112 S. Ct. 332 (1991) (White, J. dissenting from denial of certiorari) (noting split in the circuits). This Circuit adopted the *Shearin* approach in *Schiffels* and stated that there is no need to show the injury to the plaintiff arose out of a "predicate act" as long as it arose from an "overt act" in furtherance of a RICO conspiracy, thereby being injured "by reason of" the conspiracy. *Schiffels*, 978 F.2d at 349. Schiffels had RICO standing where she sued her employer under the theory that "the defendants [employer] conspired to violate § 1962(c) by conducting the affairs of an enterprise--the Kemper Plan--through a pattern of mail fraud. The defendants harassed and eventually fired her, she says, to further the conspiracy by keeping her from revealing the fraudulent scheme." *Schiffels*, 978 F.2d at 351. The Court noted that finding standing in this context would not open the floodgates to many potentially frivolous suits because the common law principle of proximate cause will still provide a limit on standing to sue under RICO. *Schiffels*, 978 F.2d at 350 (citing *Holmes*, 503 U.S. 258, 112 S. Ct. 1311 (1992)).

In light of the foregoing, the plaintiffs have standing to sue for RICO conspiracy if they alleged that their injuries arose out of one or more "overt acts" in furtherance of PLAN thereby being injured "by reason of" the conspiracy. *See Schiffels*, 978 F.2d at 349. It is also unnecessary to decide which of the alleged conduct would constitute predicate acts--all that is necessary is that the conduct was done in furtherance of the enterprise. *Id.*

Defendants have argued that the complaint fails to allege the existence of a RICO conspiracy under section 1362(d) with

sufficient specificity. However, Fed.R.Civ.P. 8(a)(2) merely requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Each count of the complaint should contain such a statement. There are heightened pleading requirements for pleading fraud which are contained in Fed.R.Civ.P. 9, but they apply *only* to cases alleging fraud. "Rule 9(b) applies only to fraud or mistake, not to conspiracy. [A] pleading of conspiracy, apart from the underlying acts of fraud, is properly measured under the more liberal pleading requirements of Rule 8(a). Even so, the complaint must allege some factual basis for a finding of a conscious agreement among the defendants." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n. 4. (2d Cir.1990); *see also Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F. Supp. 1362, 1372 (D.Conn. 1987). The requirements for pleading a RICO conspiracy are measured by the liberal pleading requirements of Fed.R.Civ.P. 8(a). *Farberware v. Groben et al.*, 1992 WL 80722 (S.D.N.Y. 1992). It is inappropriate to dismiss a complaint without allowing the plaintiffs the opportunity to discover whether, in fact, their injuries resulted from the defendants actions. The court is uncomfortably aware that this is a nine-year old case, in which some discovery has been completed. However, a Third Amended Complaint is before the court today. The age of the case does not change the liberal pleading requirements of Rule 8. As discussed above, both DWHO and Summit have pled that the defendants have conspired at PLAN meetings to (violently) close clinics that provide abortion services, and deprive NOW's women members the opportunity to avail themselves of those services. That is all that is required at this time to state a claim of a RICO conspiracy.

Finally, Defendants Terry, Operation Rescue, and Project Life all contend that no specific allegations of predicate acts are made against them and that therefore they should be dismissed from this case. This argument misconstrues the concept of *conspiracy*. Terry is alleged to be a conspirator in the PLAN enterprise, and thus, although there are no allegations that he committed any substantive acts against the plaintiffs in his own right, he may still be held liable for *conspiring* with the other defendants. That satisfies proximate cause for the § 1962(d) conspiracy. Operation Rescue is a member of PLAN and is alleged to have orchestrated the "National Day of Rescue" which affected the plaintiff clinics individually and to have made "class-wide threats of force and violence against all clinics [that provide abortion services]." Operation Rescue has therefore allegedly committed predicate acts against DWHO, Summit and NOW. The status of Project Life is more difficult. Project Life is alleged to have organized "massive blockades" and "clinic invasions" which were designed to block access to the clinics to prevent patients and staff from entering or leaving the facility and to create a threatening and intimidating atmosphere and a public image of danger at the clinics--thereby violating "substantive RICO" under § 1962(c). (Complaint ¶ 59). This is alleged to violate the Hobbs Act, which is a predicate act under RICO. Project Life is alleged to have participated in many of PLAN's annual conferences.[19] Although

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[19]The word "participate" has given this court some difficulty. Although 18 U.S.C. § 1962(c) prohibits "conducting or participation directly or indirectly, in the conduct of [a RICO] enterprise's affairs," the term is, in the linguistic sense, broad. Webster's Third New International Dictionary 1646 (1976) ("participate" means "to take part in something, usually in common with others"). However, the Supreme Court recently interpreted the phrase and concluded that "participate" requires some "element of direction."

(continued...)

this is not a predicate act per se, it does connect Project with PLAN and could give rise to conspiracy liability under § 1962(d). *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) (RICO conspiracy law, like traditional conspiracy law, requires only that each defendant agree to join the conspiracy, not that he agree to commit each of the acts that would achieve the conspiracy's purpose.); *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (Personal agreement to commit two predicate acts is not a prerequisite to RICO conspiracy liability); *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146 (D.N.J. 1983) (Congress specifically provided that a conspiracy to violate substantive RICO offenses is itself a violation intended to establish separate conspiracy offense distinct from substantive offenses.), *aff'd in part, rev'd in part*, 742 F.2d 786 (2d Cir.) (Defendants must knowingly agree to further the affairs of the enterprise to be liable under RICO), *cert. denied*, 469 U.S. 1211, 105 S. Ct. 1179 (year). Thus, all three of the Terry Defendants have been adequately bound in this complaint under either a direct

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[19](...continued)
Reves v. Ernst & Young, 507 U.S. 170, 113 S. Ct. 1163, 1169-70 (1993). The Supreme Court adopted the "operation and management" test established by the Eighth Circuit in *Bennett v. Berg*, 710 F.2d 1361, 1364 (en banc), *cert denied sub nom. Prudential Ins. Co. of America v. Bennett*, 464 U.S. 1008, 104 S. Ct. 527 (1983). *Reves*, 113 S. Ct. at 1169-70. It is unnecessary (and impossible) for this court to analyze now whether any of the defendants' conduct rises to the level of "operation and management" of PLAN. Plaintiffs have pled that the defendants "participated" in PLAN which this court will interpret as meaning "operate or managed" in light of *Reves*. Nothing more need be pled at this time to overcome these motions to dismiss. Nonetheless, plaintiffs are reminded that they will eventually have to prove facts which shows each of the remaining defendants did something more than attended PLAN meetings and/or endorsed its positions.

predicate act or a conspiracy theory of liability under section 1962(d).

B. Pleading Deficiencies

Defendants have alleged several pleading deficiencies in the Third Amended Complaint: (1) whether the violations of the Hobbs Act are well-pled; (2) whether a RICO conspiracy has been pled under § 1962(d); (3) whether a violation of § 1962(c) has been pled.

1. Hobbs Act

On remand, the Seventh Circuit directed this court to address whether the Defendants' actions violated the Hobbs Act. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 *2. The Defendants come at this question from two different angles. First, the Terry Defendants contend that there simply are insufficient facts alleged upon which this court could grant relief because the Complaint fails to allege that Defendants obtained property from the Plaintiffs. Second, the Scheidler Defendants state that the Plaintiffs' reading of the Hobbs Act is too broad based upon the basic language of the statute, and the acts alleged as violating the Act simply do not state a violation. Essentially, however, both sets of defendants make the same argument: that their actions did not violate the Hobbs Act. Plaintiffs argue that the Hobbs Act predicate acts are well-pled; that there is no need to allege that the property that they lost wound up in the Defendants' hands.

The Hobbs Act is violated by anyone who "in any way or degree obstructs, delays, or affects commerce . . . by robbery or

extortion or attempts or conspires to so do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to violate [this section]. . ." 18 U.S.C. § 1951(a). Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

The elements of a Hobbs Act violation are: the defendants (1) induce their victims to part with property; (2) through the use of fear; (3) with an adverse effect on interstate commerce. *United States v. Local 560, Int'l Brotherhood of Teamsters*, 780 F.2d 267, 281, *cert. denied*, 476 U.S. 1140 (1986); *see* Harold Brown, *Civil RICO Practice: Causes of Action* 314 (1991); Carole Golinski, *In Protest of NOW v. Scheidler*, 46 Ala. L. Rev. 163, n.134 and accompanying text (1994).

The definition of "property" under the Hobbs Act is expansive. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d. Cir. 1990). The Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . ." *United States v. Stirone*, 361 U.S. 212, 215, 80 S. Ct. 270, 272 (1960). "In a broad sense, [property includes] any valuable right considered as a source or element of wealth, including 'a right to solicit business.'" *Town of West Hartford*, 915 F.2d at 101 (quoting *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021, 90 S. Ct. 1262 (1070), and citing *Northeast Women's Center*, 868 F.2d 1342, 1350). The property affected may be either tangible or intangible, such as the right to conduct business. *Northeast Women's Center, Inc. v.*

McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989) (citing *Local 560*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), for the proposition that the Hobbs Act extends to protect intangible as well as tangible property). The right to pursue a lawful business has likewise been protected. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S. Ct. 57 (1928); *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969).

Indeed, the Seventh Circuit noted earlier in this case that "the Hobbs Act . . . does not require that the Defendant profit economically from the extortion." *NOW v. Scheidler*, 968 F.2d at 630 n.17 (citing *Town of West Hartford*, 915 F.2d at 102; *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (defendant kidnapped and threatened to kill doctor unless he agreed to stop performing abortions violated Hobbs Act); *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

Extortion under the Hobbs Act, thus, focuses on the loss to the victim. *United States v. Santoni*, 585 F.2d 667, 672 (4th Cir. 1978) ("the gravamen of the offense [of extortion under the Hobbs Act] is loss to the victim," quoting *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977)). If Plaintiffs have alleged that they have sustained economic losses resulting from Defendants' actions, that is sufficient to withstand this motion to dismiss.[20] The plaintiff clinics allege that the Defendants deprived them of: (1) business between patients and themselves; and (2) a business relationship with doctors and other personnel who were induced to quit because of

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[20]Plaintiffs' argument that the Defendants did "obtain" or seek to obtain the plaintiff clinics' patients, and the clinics' agreement not to perform abortions is therefore superfluous. The court need not reach this argument.

Defendants' actions. The right to provide abortion services has specifically been included in the "property" included in the Hobbs Act protection, *Northeast Women's Center*, 868 F.2d at 1350, as has a business' goodwill and customer revenues, *United States v. Zemek*, 634 F.2d 1159, 1173 (9th Cir. 1980). Plaintiffs also allege deprivation of certain tangible items which were damaged or lost in various blockades and "blitzes" of the clinics. Summit alleges it lost a business relationship with a potential landlord because of Migliorino's actions and interference. These allegations are sufficient to show that the Plaintiffs parted with property.

Similarly, the Scheidler Defendants' contention that the "rule of lenity" restrains this court from deciding that no economic profit is required under the Hobbs Act. The Hobbs Act violations are predicate acts in a *civil* RICO action. The rule of lenity only applies to criminal actions. *United States v. Hopson*, 18 F.3d 465, 469 (7th Cir. 1994) ("The rule of lenity dictates that when a statutory ambiguity cannot be resolved through standard methods of interpretation, the ambiguity should be resolved in favor of the criminal accused," citing *Chapman v. United States*, 500 U.S. 453, 462-64, 111 S. Ct. 1919, 1926 (1991); *United States v. Bass*, 404 U.S. 336, 347-48, 92 S. Ct. 515, 522-23 (1971)). Thus, the rule is of no aid to the defendants in this case.

The court now turns to the remaining requirements to allege Hobbs Act violations. *See Local 560, Int'l Brotherhood of Teamsters*, 780 F.2d at 281. Plaintiffs allege, and the Defendants do not contest, that they parted with this property because they feared violence would occur if they did not. Moreover, Plaintiffs allege that the Defendants, through the

PLAN enterprise and individually, threatened and committed forceful and violent acts against them and other similarly situated clinics. Third, Plaintiffs have alleged the Plaintiffs' businesses function in interstate commerce, because some patients do not reside in the state where the clinics are located. Thus, Congress' power, and therefore the Hobbs Act, reaches the Defendants' activities. The Hobbs Act predicate acts are well-pled.

United States v. Enmons, 410 U.S. 396, 406 n.16, 93 S. Ct. 1007, 1013, cited by the Defendants, is not to the contrary. *Enmons* says that when labor unions strike for legitimate purposes, the Hobbs Act does not apply to those activities. The problem is, of course, that in labor strikes, the purpose is to cause or threaten economic harm to achieve the union's purposes. Similarly, here the aim was to cause economic harm to achieve the defendants' purposes. In labor law the use of this concerted activity to cause or threaten harm is specifically sanctioned by statute--here it is not. Moreover, the ultimate goal of these defendants is to interfere with the exercise of a constitutional right. This is so far removed from the circumstances of *Enmons* that any reliance upon that case by defendants is misplaced.

Finally, the Terry Defendants' contention that this well-accepted view of the Hobbs Act would encompass "virtually any unlawful activity designed to change anyone's conduct" is erroneous. The vast majority of circuits who have passed on this issue were not concerned with this issue. Moreover, the Act is not without limits. The Act specifically limits "extortion" to acts that were induced by wrongful use or threatened use of *"force, violence, or fear, or under color of official right."* 18

U.S.C. § 1951(b)(2) [emphasis added]. This distinguishes the situation in which persons agree to a peaceful boycott and picketing of a business to achieve legal objectives. Thus, Defendants' examples of chaining oneself to a redwood and blocking the entrance of an auditorium would not violate the Act unless done in a manner so as to threaten force, violence, or fear. To be sure, the use of the Hobbs Act in cases such as *Northeast Women's Center* and *Town of West Hartford* may approach the limits of the Act's reach. However, Defendants are simply incorrect in asserting that allowing the Hobbs Act predicate acts stand greases a "slippery slope."

Defendants' argument that this case is analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience is correct, but that argument works in Plaintiffs' favor. Indeed, many who fought segregation using civil disobedience--as well as those who used violence--were arrested, jailed, and otherwise punished. The court reminds the Defendants that Dr. Martin Luther King, Jr. spent many days in jail for his civil disobedience. Indeed, many of the acts of civil disobedience during the 1960's were committed to test the constitutionality of the laws that were disobeyed. Because one fights a political cause does not mean that his conduct is immunized from liability. The law applies to all citizens in this country, even those who violate the law out of conscience. Currently, the law protects clinics who perform legal procedures, including abortions. Since *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court has recognized a woman's right to have an abortion under certain circumstances without undue interference by the state. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct.

2926 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972 (1990).

2. Pleading a RICO Conspiracy

RICO prohibits any person from conspiring to violate any of its subsections. 18 U.S.C. § 1962(d). The core of a RICO civil conspiracy is an agreement to commit predicate acts. Defendants claim that the Complaint does not plead a RICO conspiracy violation with adequate specificity. The Scheidler Defendants and Migliorino argue that Plaintiffs have not alleged that there was an agreement between the parties to conduct an "enterprise." Defendants also argue that the failure to allege specifics about the "agreement" of the parties should be fatal. Plaintiffs maintain that they have alleged sufficient agreement to withstand this motion to dismiss the RICO conspiracy count.

A RICO conspiracy claim is governed by traditional concepts of conspiracy law, and "'should not require anything beyond that required for a conspiracy to violate any other crimes.'" *Schiffels*, 978 F.2d at 348 (7th Cir. 1992) (quoting *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir.1986), *cert. denied*, 479 U.S. 940 (1986)). "Section 1962(d)'s target, like that of all provisions prohibiting conspiracies, is the agreement to violate RICO's substantive provisions, not the actual violations themselves." *Schiffels*, 978 F.2d at 348 (citations omitted). "Thus, while a conspiracy to violate RICO requires an agreement to commit a pattern of predicate acts, it does not require that any predicate acts actually be committed." *Id.* (citations omitted). Thus, a civil RICO conspiracy complaint must allege, at the very least, an agreement to commit a pattern

of predicate acts or facts from which such an agreement may be inferred. *Schiffels*, 978 F.2d at 352 (may allege facts from which agreement to violate § 1962 may be inferred); *Hecht*, 897 F.2d at 25 (must allege agreement specifically); *see Rose*, 871 F.2d at 366 (conspiracy claim must contain supporting facts which describe the conspiracy's general composition, its objectives, and the defendant's general role in the conspiracy). In other words, the agreement which is alleged under section 1962(d) must be pled with at least some degree of particularity. All that is required by the Seventh Circuit at this stage is that the Plaintiffs allege (1) that each defendant agreed to conduct the affairs of an enterprise; (2) that each defendant agreed to the commission of at least two predicate acts (or to the furtherance of the enterprise through predicate acts); and (3) that each defendant knew that those predicate acts were part of a pattern of racketeering. *Schiffels*, 978 F.2d at 352; *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986).

The Plaintiffs have met this burden as to all defendants except Wojnar and Project Life, who will be dismissed from this case. Plaintiffs have alleged that the other defendants (except Vital-Med) have agreed to drive all clinics who furnish abortion services out of business--in fact, that was the purpose of their organization of PLAN. The Complaint alleges that Scheidler and Terry sat on PLAN's leadership council. (Complaint ¶¶ 11-12). PLAL and Project Life *participated*[21] in the annual PLAN meetings. (Complaint ¶¶ 41 (PLAL only), 49 (PLAL only), 55, 58). Scholberg attended a "mini-conference"

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[21]*See supra* note 19 regarding what the plaintiffs must prove "participate" means in order to state a section 1962(c).

in St. Louis on December 14, 1986, as well as other PLAN meetings. (Complaint ¶ 53, 55). Migliorino *participated* in the PLAN convention in Chicago from August 25 to 27, 1988 and forced Summit's prospective landlord to breach the lease between the parties. (Complaint ¶ 58, 80-81). Operation Rescue was part of PLAN's project to blockade clinics in furtherance of PLAN's purpose to close abortion clinics down, and conducted several blockades in New York City, Long Island, Cherry Hill, New Jersey and Atlanta. (Complaint ¶¶ 60, 63, 64, 66). Murphy organized some of the OR blockades and assisted in the theft and storage of fetal remains from Vital-Med. (Complaint ¶¶ 65, 69, 70, 71). Murphy also *participated* in annual PLAN conventions. (Complaint ¶ 84). Scholberg, for example, attended a PLAN "mini-conference" on December 14, 1986 in St. Louis, Missouri, took part in the annual PLAN convention in Atlanta, Georgia on May 2, 1987, and was the assistant director of PLAL from February, 1988 until approximately 1990. (Compl. ¶¶ 13, 53, 54). PLAL allegedly took part in numerous PLAN conventions and *participated* in the organization and execution of several violent clinic blockades. (RICO Case Stmt. pp. 13-14).

Thus, plaintiffs have alleged that each of the defendants except Wojnar, Project Life, and Vital-Med have participated in PLAN's affairs as an enterprise, which is all that is required to plead substantive RICO. The rest of the defendants have an affiliation with PLAN and showed at least tacit agreement to "operate or manage" its affairs. The question is whether tacit agreement alone states a RICO conspiracy sufficient to withstand these motions to dismiss. Defendants have argued that this court should require proof of at least some overt act in furtherance of the conspiracy. In making this argument,

defendants not only espouse the minority position, they ignore the law of this circuit. *Compare United States v. Garver*, 809 F.2d 1291 (7th Cir. 1987); *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986); *United States v. Angiulo*, 847 F.2d 956, 964 (1st Cir.), *cert. denied*, 488 U.S. 928 (1988), *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986); *United States v. Local 560*, 780 F.2d 267, 294-95 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); *with United States v. Schell*, 775 F.2d 559, 568 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986) (criminal RICO case in which proof of overt act in furtherance of the RICO conspiracy required); *United States v. Boldin*, 772 F.2d 719, 727 (11th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986).

The Seventh Circuit has stated "the substantive proscriptions of the RICO statute apply to insiders and outsiders--those merely 'associated with' an enterprise--who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity." *United States v. Garver*, 809 F.2d 1291 (7th Cir. 1987) (quoting *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978)). In other words, if Plaintiffs have alleged that the Defendants committed acts in furtherance of PLAN, that is enough to show agreement to the conspiracy. Nothing more is required. The clearest form of agreement is Scheidler's and Terry's participation in PLAN's leadership council. By participating in this council, both Scheidler and Terry agreed to lead PLAN which, in turn, is alleged to be an illegal enterprise. This agreement to participate in PLAN's activities, coupled with

the agreement to commit predicate acts, establishes "operation and management" and therefore potential liability against Terry and Scheidler. *See Reves*, 113 S. Ct. at 1169.

"Participation" in PLAN's annual meetings by Murphy, Migliorino, and PLAL are closer calls. However, the allegations that these parties participated in meetings are coupled with allegations of the commission of other activities in furtherance of PLAN's purpose to shut down abortion clinics. Either one of these allegations, standing alone, would be insufficient to impose liability under 1962(d). However, taken together, the allegations show sufficient agreement to meet the first prong of the *Schieffels* analysis (that each defendant agreed to conduct the affairs of the enterprise). Thus, the first prong of the analysis is satisfied.

The second prong in the analysis is whether each defendant agreed to the commission of at least agreed two predicate acts, or at least to the furtherance of the enterprise. *Schiffels*, 978 F.2d at 352; *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889 (N.D. Ill. 1987); *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990). Defendants contend that this statement of the law is insufficient. Defendants argue that they must have agreed to participate in each predicate act. This is patently wrong. All *Schiffels* requires in order for a defendant to be held liable for RICO conspiracy under 1962(d) that he or she *agree* to the commission of at least two, but only two, predicate acts. *Schiffels*, 978 F.2d at 352. Moreover, there is some support within this circuit for an even lesser standard: that the defendants agree to conduct themselves on behalf of an enterprise. *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (Personal agreement to commit two predicate acts is

not a prerequisite to RICO conspiracy liability); *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889 (N.D.Ill. 1987).

This does not mean that each defendant must have *committed* two predicate acts--only that each *agree* to their commission. In other words, each defendant must have agreed to the commission of two acts in furtherance of the enterprise, or, at a minimum, agreed to the furtherance of the enterprise generally. The Complaint passes this test as to all defendants except Wojnar, who has never been alleged to have attended a PLAN conference or participated in PLAN's leadership.

The final prong of this test is whether the defendants knew that the acts were committed in a pattern of racketeering, *Schiffels*, 978 F.2d at 352, with "awareness of the nature and scope of the enterprise and intended to participate in it." *United States v. Muskovsky*, 863 F.2d 1319, 1324 (7th Cir. 1988), *cert. denied*, 489 U.S. 1067, 109 S. Ct. 1345 (1989). Plaintiffs have met their burden here as well. PLAN's essential purpose, viewed in a light most favorable to Plaintiffs, was to engage in a pattern of racketeering activity (such as blockades and theft) that was designed to inflict, and has inflicted, injury on the business and property of plaintiff clinics who provide such services. (Complaint ¶¶ 1, 41). Clearly, Scheidler and Terry, who sit on PLAN's leadership council, have sufficient understanding of PLAN's workings to know the scope of the enterprise. This knowledge may also be imparted to PLAL, who in June of 1984, is alleged to have participated in the formulation of a six-month "plan of national activities." (Complaint ¶ 37). Scholberg's awareness, viewed in light favorable to the Plaintiffs, may be inferred from his

participation in PLAN's mini-conference on December 14, 1986, in which it was specifically agreed that one of their goals was to close down clinics that perform abortion. (Complaint ¶¶ 53-54). OR's and Project Life's awareness, viewed in light most favorable to Plaintiffs, may be inferred from its "participation" in PLAN's annual conferences in which PLAN declared that it would try to stop abortions at clinics "by any and all means available. No abortion clinic will be spared," and where blockades were endorsed as necessary to take business away from the clinics. (Complaint ¶ 55, 58). Murphy's awareness of the scope of the enterprise may be inferred from his "participation" in PLAN conferences, including being a featured speaker. (Complaint ¶ 58). The court reminds the plaintiffs that it cannot conclude that simply attending one PLAN meeting would necessarily show that the defendant understood the scope of the enterprise.

Migliorino's awareness of the scope of the enterprise is tenuous. Migliorino allegedly participated in one PLAN conference on August 25-27, 1988, in which the overall goal of shutting abortion clinics down was discussed, and she was a speaker. (Compl. ¶ 17). The substantive allegations against Migliorino involve one cluster of conduct surrounding the theft of fetal remains from Vital-Med, and one cluster involving interference with Summit's future landlord. (Complaint ¶¶ 67-75, 80-81). The court concludes that these actions, taken together in a light most favorable to Plaintiffs, could show that Migliorino participated in and was aware of the scope of the enterprise, and she will not be dismissed now. It is possible that the Plaintiffs could prove some set of facts which would entitle them to relief against Migliorino under § 1962(d).

Wojnar, on the other hand, has not been named under "substantive RICO," and the only action that he is alleged to have participated in is the theft of the fetal remains. (Complaint ¶¶ 82, 67-71). This need not be addressed here, as he will be dismissed on procedural grounds.[22] All other Defendants remain under section 1962(d), with the possible First Amendment concerns of this conclusion addressed below.

3. Other Predicate Acts

Defendants have made various arguments about each of the predicate acts alleged in the complaint. The court will address each in turn.

a. Travel Act and State Law Extortion as Predicate Acts

The Terry Defendants argue that the Travel Act allegations are insufficient because the Travel Act requires that underlying acts of extortion, bribery, or arson be pled. Moreover, the Defendants maintain that extortion under the Travel Act

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[22]Even if Wojnar were not dismissed on procedural grounds, this court would dismiss him from this complaint based on lack of awareness of the scope of the enterprise. Facts that would imply Wojnar's awareness of the scope of the enterprise are limited. Wojnar points out in his reply that the Amended RICO Case Statement implicates him in two other actions; a May 11, 1985 clinic invasion and blockade and a November 11, 1985 clinic invasion and blockade. (RICO Case Statement p. 36). All these actions could be individual occurrences, without any input from or understanding of the PLAN enterprise. Thus, Wojnar would have been dismissed here based on lack of knowledge of the scope of PLAN. *United States v. Muskovsky*, 863 F.2d 1319. Wojnar's arguments regarding the sufficiency of the predicates as alleged against him will not be addressed, nor will his statute of limitations argument be considered: both of these arguments are moot as to him.

requires that property be obtained by the perpetrator. Plaintiffs argue that no property need be received by the perpetrator; all that need be satisfied is that state extortion statute be violated. Plaintiffs maintain that the extortion laws of Alabama, Colorado, Florida, Hawaii, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, Tennessee, Texas, Vermont, Wisconsin, and Wyoming do not require that the defendant receive property from the victim; only that the victim to give up either a tangible or an intangible property right.[23] Plaintiffs also argue that Defendants violated these laws.

The Travel Act was primarily designed to stem the "'clandestine flow of profits' and to be of 'material assistance to the States in combating pernicious undertakings which cross State lines." *Nardello*, 393 U.S. 286, 292, 89 S. Ct. 534, 538 (quoting S.Rep.No.644, 87th Cong. 1st Sess., 4 (1961)). The Travel Act reaches:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to--
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or

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[23]The clinics wish to maintain this suit as a class action, which could bring virtually every other state's extortion statute into play. However, because the class has not yet been certified, there is no need to address those other statutes at this time.

> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity.
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) . . . .

18 U.S.C. § 1952. Unlawful activity as defined in the Travel Act includes extortion, bribery, and arson "in violation of the laws of the State in which committed or of the United States. 18 U.S.C. § 1952(b). Unlike the Hobbs Act, the Travel Act does not define "extortion" in the statute; it leaves the definition up to individual state law. *United States v. Nardello*, 393 U.S. 286, 89 S. Ct. 534, 536 n.3 (1969). Thus, if the violations of the underlying state law extortion statutes are well pled, so are the Travel Act violations.

At common law, "extortion" could only be committed by a public official who obtained property not due to him or his office under color of law. *Id.* Many states have expanded upon such definition to include acts committed by private individuals whereby property is obtained by force, fear, or threat. *Id.* DWHO and Summit (Delaware and Wisconsin residents, respectively) have each pled violations of their state extortion statutes. Only Delaware and Wisconsin law will be addressed because, although plaintiffs wish to maintain this as a class action, the only plaintiffs currently before the court are DWHO and Summit.

The relevant Delaware statute provides:

A person commits extortion when, with the intent . . . he

compels or induced another person to deliver property to himself of to a third person by means of instilling in him a fear that, if the property is not so delivered, the defendant or another will:

(1) Cause physical injury to anyone; or

(2) Cause damage to property; or

(3) Engage in other conduct constituting a crime; or

(4) Accuse anyone of a crime or cause criminal charges to be instituted against him; or

(5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject anyone to hatred, contempt, or ridicule; or

(6) Falsely testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(7) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(8) Perform any other act which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships.

Del.Cod.Ann. tit. 11, § 846 (1990).

Defendants allege conclusorily that this statute requires obtaining property and plaintiffs have failed to allege this element. Plaintiffs maintain that they *have* alleged that Defendants obtained property from them because Delaware's definition of property is broad enough to encompass DWHO's agreement not to enter business relationships with their patients.

Only a state court can authoritatively interpret its own state statutes and laws. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S. Ct. 1400, 1404 (1971); *Waldron v. McAtee*, 723 F.2d 1348, 1352 (7th Cir. 1983). Delaware apparently has not construed the definition of property in this context. The parties have cited no authority on the matter, and the court's independent research has found a similar void. In the absence of guidance from Delaware state courts, a federal court should decide the issue in a way in which it believes the highest state court would rule of the issue were presented to it. *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561, 574 (7th Cir. 1993). This is difficult here, as it requires this court, sitting in Illinois, to determine what the Delaware Supreme Court would decide. In this difficult circumstance, this court will focus on the language of the statute itself.

In its statute on theft, Delaware's definition of property is: *"anything of value except land,* and includes . . . documents although the rights represented thereby have no physical location, contract, rights, choses in action. . . ." Del.Cod.Ann. tit. 11 § 857(4) [emphasis added]. Moreover, Delaware Supreme Court *has* concluded: "the offense [of extortion] is

complete when the threatening statement or communication is made, or is caused to be made with the intent to extort or wrongfully gain money or other property." *Bilinski v. State*, 462 A.2d 409 (Del. 1983) (quoting *Bove v. State*, 33 Del. 229, 134 A. 630 (Del.Supr.1926)).

Property is defined as "anything of value except land . . . including rights that have no physical location." Del.Cod.Ann. tit. 11 § 857(4). It appears that the Delaware legislature attempted to make its theft statutes as broad as possible in order to combat crime most effectively. This court has already concluded that in the Hobbs Act context, the right to do business and conduct business relationships is protected "property." *See supra* at 42. Using a parallel analysis here, this court concludes that Delaware intended to have its crime statute reach as broadly as possible, just as Congress intended to allow the Hobbs Act broad scope. DWHO's right to conduct business relationships with both its patients and its personnel are therefore protected by Del.Cod.Ann. tit. 11 § 846. Plaintiffs have pled that the Defendants obtained, or attempted to obtain the clinics' agreement not to enter into business relationships with patients, doctors, and personnel. Plaintiffs specifically pled that Scheidler entered DWHO, threatened clinic administrator Cathy Conner. (Complaint ¶ 46). Plaintiffs allege that on April 12, 1986, Scheidler threatened that anti-abortionists would "get rid of" clinics such as DWHO. (Complaint ¶ 47). The Plaintiffs' allegations satisfy Delaware § 846(8), which prohibits threatening to perform acts calculated to harm DWHO's business relationships. The Delaware extortion allegations are

well-pled as either attempted or actual extortion.[24] The Travel Act is violated when the underlying state's law is violated and that violation affects interstate commerce. Thus, the Travel Act allegations, as alleged by DWHO, are also well-pled.

The same arguments are maintained by Summit regarding the Wisconsin extortion statute. The relevant Wisconsin statute prohibits individuals from:

> [V]erbally or by any written communication, maliciously threatening to accuse or accuses another of any crime or offense, or threatening or commit[ing] any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling, or trade of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act ...

Wisc.Stat.Ann. § 943.30 (1995).

The Terry Defendants claim that the phrase "with intent thereby to extort money or any pecuniary advantage whatever" combined with the disjunctive "or with intent to compel the person so threatened to do any act against the person's will . . ." shows that this statute was designed to address two offenses;

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[24]To establish the commission of attempted extortion, Plaintiffs must show, inter alia, that the defendant took a substantial step toward "instilling" fear in another that he would cause "physical injury to anyone" or "damage to property," if property other than his own were not delivered to him. *Bilinski v. State*, 462 A.2d 409 (Del.1983); Del.Cod.Ann. tit. 11 § § 531, 846(1), (2).

extortion by the first clause and coercion by the second. Further, Defendants point out that only extortion, and not coercion, is a predicate RICO offense. Thus, they argue, the Wisconsin extortion statute does not reach the conduct alleged in the Complaint.

Plaintiffs maintain that the Defendants have misconstrued the Wisconsin statute, and they cite both state and federal law in support of their position that Wisconsin does not require that property be "received." The Wisconsin Court of Appeals has held that "extortion may . . . be committed if no property or money is transferred, but the victim is coerced to do something against his or her will." *State v. Dauer*, 174 Wis. 2d 418, 497 N.W.2d 766, 771 (Wis. Ct. App. 1993). However, this conclusion was made in the context of distinguishing the Wisconsin extortion statute from the state robbery statute. Thus, this analysis is not as forceful as if the court had decided a case similar to this one, where the extortion/coercion distinction was at issue. However, no such a case has been cited or found. Thus, it is fair to conclude, in the absence of contrary authority, that Wisconsin does not require the receipt of property to be proven in order to establish an extortion offense.

Moreover, intangible property rights, such as choses in action, have been held to constitute "property" under Wisconsin's § 943.30. *State v. Manthey*, 169 Wis. 2d 673, 487 N.W.2d 44, *rev. denied*, 491 N.W.2d 768 (Wis. Ct. App. 1992) (Defendant who was prospective witness in a civil action and who threatened to have extensive memory lapses at trial unless she was paid to testify committed extortion by threatening to injure litigant's property interest in the suit). Thus, Defendant's argument that the right to conduct business relations is not

recognized in Wisconsin is invalid. The Complaint's allegations that Plaintiffs were forced to give up their right to conduct business relationships state a valid claim for relief under Wisconsin law. The Travel Act allegations are likewise valid, as the underlying state law claims have been properly pled. *See United States v. Nardello*, 393 U.S. 286, 89 S. Ct. 534, 536 n.3 (1969).

b. Theft of Fetal Remains As Predicate Act

Plaintiffs have pled violations of 18 U.S.C. § 659,[25] which prohibits theft from interstate shipment, as predicate RICO acts. The section 659 allegations arise out of Defendants' alleged theft of fetal remains and medical information thereon from Vital-Med's facility. The Scheidler Defendants claim that these allegations do not state valid predicate RICO acts because the fetal remains were not alleged to have been valued over one hundred dollars, as required by RICO 18 U.S.C. § 1961(1).

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[25]18 U.S.C. § 659 provides:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains rom any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, stationhouse, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part or which constitute an interstate or foreign shipment of freight, express or other property; or
>
> . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money baggage, goods, or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Plaintiffs argue that they have pled enough to withstand this motion to dismiss, and that they will prove at trial that the fetal remains were worth "far more" than the one hundred dollar requirement.

In order for a section 659 violation to be a predicate act under section 1961(1), the act must be felonious. Under section 659, a defendant may only be convicted of a felony if the value of the property in question is at least one hundred dollars. *United States v. Brookins*, 52 F.3d 615, 1995 WL 144253 *3 (7th Cir. 1995). "Value" is defined in section 659 as "face par or market value, whichever is greater." *Id.* (quoting *United States v. Ditata*, 469 F.2d 1270, 1273 n.3 (7th Cir. 1972). Market value, in turn, is "the price a willing buyer will pay a willing seller at the time and the place the property was stolen or at any time during the receipt or concealment of the property." *Id.* (quoting *United States v. Bakken*, 734 F.2d 1273, 1278 (7th Cir. 1984). The *Brookins* court was concerned with the sufficiency of the evidence which showed that the defendant was guilty of stealing a camera. Evidence was admitted showing that the undercover agent who arrested the defendant had been offered the camera for $ 350, to which the agent eventually agreed. *Brookins*, 52 F.3d 615, 1995 WL 144253 at *1. The court concluded that this evidence was "more than sufficient" to establish the value of the camera over one hundred dollars. *Id.* at *3.

This case has a different procedural posture. Instead of reviewing a trial court's conclusion of the value of the property, this challenge comes in the form of a motion to dismiss. This court concludes that the Plaintiffs should have the opportunity to show that the fetal remains and the accompanying medical

information were worth more than $ 100. It would be premature to dismiss the section 659 allegations without allowing Plaintiffs such an opportunity.

That being said, this court emphasizes the test set forth in *Brookins* will guide the evaluation of the evidence of the value of the property. However, in light of the lenient pleading requirements of the Federal Rules of Civil Procedure, the court will not dismiss the section 659 violations at this time. The Defendants are on notice of what dates, times, and actions support the Section 659 claim; that is all that is required of the Complaint at this juncture.

C. Availability of Injunctive Relief

The Plaintiffs have sued under 18 U.S.C. § 1964(c), which provides standing for private plaintiffs to enforce RICO. The subsection provides that any civil plaintiff "shall recover" treble damages and a reasonable attorney's fee. The Scheidler Defendants contend that this narrow statement of available relief precludes the Plaintiffs from suing to obtain equitable relief. Plaintiffs contend that they are entitled to seek injunctive relief, and, moreover, even if it is not so entitled, the form of relief to be obtained is "not a Rule 12(b)(6) issue."

Although Plaintiffs may be correct that, generally speaking, the form of relief is not an issue upon which a court could base a dismissal, this case raises peculiar issues in a unique posture. *See Doe v. U.S. Dept. of Justice*, 243 U.S. App. D.C. 354, 753 F.2d 1092, 1104 (D.C.Cir. 1985) (court cannot dismiss a claim as long as some relief may be granted from facts alleged on the face of the complaint, citing 5 Wright & Miller, *Federal*

Practice and Procedure § 1357 at 602 and n.77 (other citations omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2136 (1992) (court must be able to address the alleged injury with a favorable decision).

Section 1964, entitled "Civil Remedies," provides in subsection (a):

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by *issuing appropriate orders, including, but not limited to:* ordering any person to divest himself of any interest, direct or indirect, in any enterprise; *imposing reasonable restrictions on the future activities* or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

[Emphasis added]. Thus, it is clear that Congress intended to allow courts to issue injunctive relief.

Nonetheless, the circuits are divided on whether private parties may petition the court for injunctions for civil RICO violations. *Conkling v. Turner et al.*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). Some courts have concluded that this relief is not available to private parties, *see Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986) (expressly holding injunctive relief not available to private

litigants under RICO), *cert. denied*, 479 U.S. 1103, 107 S. Ct. 1336 (1987); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) ("substantial doubt about whether RICO grants private parties . . . a cause of action for equitable relief."); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D. Ill.1984) (RICO does not permit equitable remedies such as declaratory judgment and recision), while others have concluded that private plaintiffs *may* avail themselves of equitable remedies. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir.1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir. 1988) (holding that RICO does not authorize injunctive relief against transfer of all defendant's assets in a RICO action for treble damages, but not deciding "whether all forms of injunctive or other equitable relief are foreclosed to private plaintiffs under RICO"); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the plaintiff's favor, and a public benefit); *Humana, Inc. v. Avram Jacobson*, 804 F.2d 1390 (5th Cir. 1986) (same); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S. Ct. 527 (1983); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute), *aff'd other grounds*, 730 F.2d 905 (2d Cir.1984).

see also Batista, *Civil RICO Practice Manual* 169 (1987) (§ 6.13 -- The Availability of Injunctive Relief).

The Seventh Circuit has not yet ruled on this issue. However, in light of the Supreme Court's instruction that "RICO is to be read broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime," *Sedima*, 473 U.S. 479, 498, this court is reluctant to read the statute in a limited way. Moreover, there is substantial authority for allowing private parties to seek equitable remedies, and even though that authority does not arise in this circuit, this court is persuaded by the rationale in those opinions. The court concludes that the Plaintiffs may seek the equitable remedies they ask for in the Third Amended Complaint. *Lincoln House*, 903 F.2d 845 (1st Cir.1990); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir.1988); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir.1982), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S. Ct. 527 (1983); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y.1983). Having concluded that the court's power encompasses the Plaintiffs' prayer for the court to "enjoin Defendants and their co-conspirators from further racketeering activity," the court notes that any potential injunction or "reasonable restrictions" imposed must pass muster under the First Amendment.

IV. First Amendment Concerns

Just two issues remain before the court at this time; both involve claimed constitutional rights. These issues are addressed last because, although they are part of the mandate of the Seventh Circuit, courts are constrained to decide cases

without reference to the federal constitution whenever possible. *Redgrave v. Boston Symphony Orchestra Inc.*, 855 F.2d 888, 911 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989). The first issue deals with the extent to which the First Amendment protects Defendants' actions, and the second concerns the facial constitutionality of the RICO statute.

A. Freedom of Speech

The Seventh Circuit directed this court to address, "if necessary, . . . which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution." *Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. This direction follows Justice Souter's comment in concurrence: "even in a cases where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Scheidler*, 114 S. Ct. at 807 (Souter, J. concurring).

The Defendants argue that the use of civil RICO is inappropriate in this context because, even if they did commit predicate acts, their actions, including the allegations of attempt, advocacy, and commission of arson, kidnapping and murder, were done in the furtherance of their political beliefs. Therefore, Defendants argue, those actions are protected by the First Amendment. Defendants focus on three paragraphs containing predicate acts under count I (RICO § 1962(c)) of the Complaint in support of their position: paragraphs 87N, 87O. and 87Q. Paragraph 87N alleges that the RICO Defendants committed a predicate act of:

Encouraging, organizing, and inciting the commission of arson, in violation of state arson and extortion laws, including but not limited to *[1] urging* the destruction of "bricks and mortar," and *[2] declaring* that arson is not "violence"; *[3] applauding and endorsing* acts of arson by co-conspirators' *[4] encouraging, inciting and inducing* acts of arson through letters, speeches, films, various writings, and other media; *[5] urging* followers to act as of violence were permissible of it were to stop abortions; *[6] praising* the depiction of co-conspirators in front of clinics destroyed by arson; *[7] teaching* followers (including highly succeptable and vulnerable individuals) that arson is trivial and is justified of it prevents an abortion; *[8] encouraging* those who have committed arson to keep up their work *and assisting* them in doing so; *[9] ridiculing* those who reject force and violence as a method to express their opposition to abortion, including but not limited to calling them "wimps," "wimps-for-life" and similar expressions; and *[10] encouraging* followers to emulate those who have been convicted of arson on repeated occasions. [Numbers and emphasis added].

Paragraph 870 alleges that the RICO Defendants "attempted and conspired to kidnap. . . *by encouraging, organizing, and inciting* the kidnapping of doctors who perform abortion. . . [emphasis added]" Paragraph 87Q alleges that the RICO Defendants attempted to commit murder "by encouraging and inciting members of the enterprise to commit murder. [emphasis added]" Although the Defendants do not cite other paragraphs of the complaint which may run afoul of the First Amendment. there are others which the court, in an independent analysis, believes call the First Amendment into

question. These paragraphs[26] and the allegations contained therein will also be addressed because the Seventh Circuit has mandated that this he done.

Plaintiffs argue that they treasure the First Amendment and its protections as much as the Defendants, but that Defendants' acts are not immunized simply because they were committed with a political goal. Plaintiffs contend that the actions alleged in the complaint go beyond the protections of free speech and move into unprotected, violent action and/or unconstitutionally protected "incitement" speech.[27] Plaintiffs argue that to the extent that free speech issues are implicated by the Complaint, they may be adequately addressed by giving a proper jury instruction at the time of trial. (Response p. 4 n.6). Plaintiffs also argue that the Defendants' speech and actions have created a "context of violence" which causes them to fear for their safety if they were to pursue their rights as clinics to operate. Because the speech and actions created this "context," Plaintiffs argue, both the speech and the acts run afoul of the First Amendment and should be enjoined.

Central to the concept of civil liberties in this society is the

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[26]The paragraphs are: ¶¶ 28, 29, 30, 33, 36, 42, 45, 47, 57, 58, and 74.

[27]Plaintiffs also make significantly broader arguments regarding the First Amendment's application to the Complaint. For example, they argue that their reference to Scheidler's book Closed: 99 Ways to Stop Abortion in paragraphs 29 and 30 of the Complaint is admissible to show Scheidler's intent, even though the book is clearly covered by the First Amendment's protection and cannot be argued to be a predicate act. (Response p.2 n.1). None of the defendants chose to raise this issue in their motions to dismiss. Nonetheless, this court must address them as mandated by the Seventh Circuit.

idea of freedom of speech. The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the government for a redress of grievance.

U.S. Const. amend. I. "The First Amendment is a charter for government, not an institution of learning. 'Free trade of ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *N.A.A.C.P. et al. v. Claiborne Hardware Co. et al.*, 458 U.S. 886, 102 S. Ct. 3409, 3423 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 537, 65 S. Ct. 315, 325 (1945)). Further, as Justice Brandeis aptly stated in his concurrence in *Whitney v. California*, 274 U.S. 357, 375, 377, 47 S. Ct. 641 (1927) (Brandeis, J. joined by Holmes, J. concurring), *overruled other grounds, Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969), freedom of conscience is essential to the "discovery and spread of political truth," to "stable government," and to "political change." Courts must therefore be extremely cautious of interpreting this important right in a limiting fashion. A key difficulty in freedom of speech litigation, and the critical problem in this case, is defining "speech" distinct from the actions surrounding it and from the actions the speech may, in turn, produce. *See* Lawrence Tribe, *American Constitutional Law* 788 (2d Ed. 1988).

The essential issue in this analysis is whether the words used by the Defendants fall into the "fighting words" exception to First Amendment protection. If the speech that Defendants engaged in falls within this exception, this court has authority to enjoin similar future speech. *Brandenburg v. Ohio*, 395 U.S.

444, 89 S. Ct. 1827 (1965) is the current state of the law regarding "subversive advocacy," or "fighting words," or speech that calls for or tends to produce or incite violence. In *Brandenburg*, the Supreme Court struck down an Ohio law which was not "directed to inciting or producing *imminent* lawless action [emphasis added]" and "likely to produce such action" yet nonetheless prohibited speech. *Brandenburg*, 395 U.S. at 447. The only way that a state may regulate speech is if the speech *does* call for immediate illegal acts which are likely to occur following the speech.

Thus, in order to qualify as "fighting words," the speech must (1) incite imminent illegal activity and (2) be likely to produce such activity. The freedom of speech is an essential right which is to be abridged only where "emergency ... makes it immediately dangerous to leave the correction to time." *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J. dissenting); *see* Tribe, *American Constitutional Law* at 844.

Some commentators have argued that the "imminence" standard requires that the time between the speech and the action be so brief that there is no opportunity for rebuttal or reflection. *See* David A.J. Richards, *Toleration and the Constitution* (1986) (Arguing that the best way to protect free speech is to allow the freedom to reach the boundaries of "equal liberty of conscience," which is the essential element of this society.) Plainly, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448, 89 S. Ct. at 1830 (quoting *Noto v. United States*, 367 U.S. 290, 297-98, 81 S. Ct. 1517, 1520-21 (1961).

In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, the Court reversed a judgment which awarded damages caused by a seven-year boycott organized by the plaintiff NAACP and its members, which was imposed against defendants, who were white-owned businesses, to achieve integration. *Claiborne Hardware Co.* is factually similar to this case because both cases dealt with political protest mixed with violence. The *Claiborne Hardware Co.* boycott consisted of picketing and "disciplining" African Americans who continued to patronize white-owned stores. The "discipline" consisted of members of the NAACP, called "Black Hats" or "Deacons," who stood outside white-owned stores and identified African Americans who transacted business with them. The Deacons then published the names of the "offenders" both orally at the NAACP meetings, and in a paper called the "Black Times." The lower court also observed that four incidents which clearly involved violence occurred because the victims ignored the boycott, and noted six others that showed an "unlawful form of discipline was applied to certain boycott violators." *Claiborne*, 458 U.S. at 905, 102 S. Ct. at 3421. Half of those ten incidents were found to have occurred in 1966, but none were conclusively found to have occurred after 1966, even though the suit was brought in late 1969. The Court concluded that the "coercion, intimidation, and threats were part of the boycott activity" and were protected by the First Amendment. *Claiborne*, 458 U.S. at 906, 102 S. Ct. at 3423. However, and importantly, the Court expressly distinguished *Milk Wagon Drivers Union of Chicago, Local 753 et al. v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, *reh'g denied*, 312 U.S. 715, 61 S. Ct. 803 (1941). In *Milk Wagon Drivers* the Court upheld an injunction that prohibited both violent and nonviolent picketing and protesting activity because of the

violent environment and conduct surrounding the activity. The *Claiborne* court distinguished *Milk Wagon Drivers* by stating, "in this case [*Claiborne*] the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of all business losses sustained over a 7-year span." *Claiborne*, 458 U.S. at 924, 102 S. Ct. at 3431. Thus, the Court gave great importance to the context of the violence in which the speech/nonspeech activities rested. Where there is a context of violence over the entire time span of the suit, and that violence is of a serious nature, such as was the case in *Milk Wagon Drivers* (in which at least fifty instances of window-smashing, explosive bombings, stench bombs, destruction of trucks and stores, serious injury to drivers and storekeepers, arson, threats and the like), the Court gives greater weight to the protection of citizens and property and less to free speech concerns. The protest speech in *Milk Wagon Drivers* occurred by both words and violent actions. Indeed, that court constructed the question as "whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are *enmeshed* with contemporaneously violent conduct which is concededly outlawed." *Milk Wagon Drivers*, 312 U.S. at 292, 61 S. Ct. at 554. The violence which was used to protest the method of milk distribution was plainly not protected by the First Amendment, although the picketing plainly was. However, where the protest activity is relatively peaceful, with only minor breaches of the peace, it is more likely that the Court will guard free speech privileges of the protesters with greater vigilance. More importantly, when peaceful and violent activity are "enmeshed, " that fact counsels in favor of regulation of the entire range of action.

Plaintiffs contend that this case is analogous to *Milk Wagon Drivers* and argue that the context in which the Defendants' speech was conducted should remove it from the protection of the First Amendment. Plaintiffs have alleged the following specific acts which provide a context of violence in which Defendants' alleged "speech" took place:

(a) Between June, 1984 and the end of 1985: forty (40) acts of arson on clinics that provide abortion clinics (¶ 40);

(b) In March of 1986: one attempted arson (¶ 44); March 26, 1986: one occurrence of destruction of clinic property (¶ 43); assault and physical injury of five persons, four on March 26, 1986 and one in December of 1987 (¶¶ 57, 87D);

(c) On April 12, 1986: one occurrence of criminal trespass and harassment (¶ 48);

(d) Twelve individually cited violent blockades in which at least one of the Defendants participated and, inter alia, blocked traffic in and out of the clinics and in which confrontations with police and patients occurred and hundreds of arrests were made on April 19, 1986, November 28, 1986, November 29, 1986, April 30 through May 2, 1987 (one per day--three total), August 27, 1987, November 28, 1987, and May 2 through 5, 1988 (one per day--four total) (¶¶ 44, 49, 51, 55, 58, 62, 63, 87D, 871(1));

(e) Beginning July 19, 1988 and continuing until December 1988, a series of Operation Rescue actions occurred in Atlanta, Georgia (¶ 64);

(f) On October 29, 1988, which was called the "National Day of Rescue" pro-life activists blockaded forty clinics across the country and in Toronto, Canada (¶ 65);

(g) Local Operation Rescue activities have continuously taken place across the country, in which more than 10,000 participants have been arrested (¶ 66);

(h) On March 10, 1993, conspiracy to commit and commission of the murder of Dr. David Gunn.

Thus, a total of over one hundred violent events have been specifically alleged within the nine-year time span covered by the Third Amended Complaint. Although these acts must be assumed to be true by this court, they do not necessarily mandate that all of Defendants' free speech rights have been forfeited. "Right to free speech in the future cannot be forfeited because of dissociated acts of past violence." *Milk Wagon Drivers*, 312 U.S. at 296, 61 S. Ct. at 556. Protected free speech, which involves words and not actions, is not implicated by the activities outlined above in (a) through (h). The Plaintiffs must allege that the protected speech, such as inciting, encouraging, and the like, is "enmeshed" in the violent acts. Specifically, Plaintiffs must allege that the Defendants' speech activity was so closely linked in time and place to the violence that the law must intervene and prohibit the provocation from occurring. They have not done so here.

Moreover, this complaint seeks not only to enjoin the Defendants from "further racketeering activity," which may or may not include speech, but it also seeks to impose civil damages for activities which clearly include speech to some

degree. *See* ¶¶ 87N, 87O, 87Q (alleging predicate acts consisting of encouraging, organizing, inciting, urging, declaring, endorsing, praising, teaching, and ridiculing others to further the pro-life cause) and p. 67, *supra*. These verbs all describe *speech* and not violence in any way. The alleged speech is patently and firmly within the boundaries of freedom of expression. Those paragraphs must be stricken from the Complaint, as they do not allege predicate acts--rather, they allege legal protest actions protected by the freedom of expression.

Moreover, the protections of the First Amendment are usually used as a shield and not as a sword. *Redgrave et al. v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1200 (D.Mass. 1985) ("The legal system stands ready to shield freedom against unlawful government intrusion, but reluctant to use the sword of damages to vindicate one claim of freedom by striking down another."), *modified*, 855 F.2d 888 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989). RICO was not enacted to collapse the freedom of speech; it was enacted to give federal peace officers a powerful weapon with which to fight organized crime.

The Defendants have called into question only three paragraphs, while the court has found a total of seventeen which implicate the First Amendment. As noted, the Seventh Circuit mandated that this court address the issue of the First Amendment as it relates to this action. This court is obliged to address "which of the defendants' activities, as alleged, are protected by the First Amendment," and therefore all seventeen paragraphs will be discussed.

Encouraging activity which was not immediately followed by violence is protected by the First Amendment. "Immediately" means within a period which does not give time for reflection. Although the Supreme Court has not set forth a "bright-line" interpretation of what "immediately" means in this context, this court assumes it to mean at maximum a twenty-four hour period. The Plaintiffs' attempt to analogize to the situation in *Milk Wagon Drivers* fails because the protected speech and the violent activities are insufficiently linked. Having stated the court's conclusion, the specific paragraphs of the compliant need to be addressed. Unfortunately, Plaintiffs have alleged both protected speech and unprotected lawless action in the same paragraph, so it is difficult to specifically navigate and strike[28] full paragraphs. Moreover, as noted above, it is unclear

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[28]To strike portions of a complaint, the allegations being challenged must be so unrelated to plaintiff's claims as to be void of merit and unworthy of any consideration. *Robinson v. The Midlane Club, Inc. et al.*, 1994 WL 577219 *2 (N.D. Ill. Oct. 19, 1994). Further, the presence of the references sought to be stricken must be prejudicial to the movant. *Pelech v. Klaff-Joss, L.P.*, 828 F. Supp. 525, 536-37 (N.D. Ill.1993) (acknowledging the seriousness implied in any poorly supported allegations, but denying motion to strike where argument at issue was not devoid of merit); *Tektel, Inc. v. Maier*, 813 F. Supp. 1331, 1334 (N.D. Ill.1992). Motions to strike are brought pursuant to Fed.R.Civ.P. 12(f) and are generally disfavored. *Robinson v. The Midlane Club, Inc. et al.*, 1994 WL 577219 *2 (N.D. Ill. Oct. 19, 1994). *see, e.g., Imperial Constr. Management Corp. v. Laborers' Int'l Union, Local 96*, 818 F. Supp. 1179, 1186 (N.D.Ill.1993) (granting a motion to strike affirmative defenses because they only added clutter to the case and because they were without merit, but upholding general rule disfavoring such motions); *Tektel*, 813 F. Supp. at 1334; *Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240, 1245 (N.D. Ill.1991); Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1380, at 647 (1990). Nonetheless, striking portions of a complaint is appropriate when "certain references in a pleading . . . not the entire paragraphs containing them should be

(continued...)

what weight several of the paragraphs are to be given because they have not been incorporated into count I, although they were incorporated into count II.

Paragraphs 29, 30, and 33[29] will be stricken in their entirety because they allege protected speech without any direct correlation with violent activity other than the "violent context" which was outlined above. This violent context, standing alone, simply cannot support the expansive restraint that Plaintiffs would impose on Defendants' freedom of speech. The phrase in

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[28](...continued)
stricken." *Id.* at 651. This court will, to the extent necessary, strike only those portions of the Complaint which are wholly void of merit and serve only to implicate validly exercised First Amendment activities.

[29]Paragraph 29 provides:

> Scheidler has distributed throughout the United States a manual, *Closed: 99 Ways to Stop Abortion*, outlining methods intended to be used to interfere with clinics such as DWHO and Summit. Scheidler's manual encourages the use of predicate acts of racketeering activity to drive clinics such as DWHO and Summit out of business.

Paragraph 30 provides:

> Scheidler has traveled throughout the country training other persons to use racketeering activity, including but not limited to the methods outlined in *Closed: 99 Ways to Stop Abortion.*

Paragraph 33 provides:

> Terry has traveled throughout the country encouraging, organizing, and training other persons to use racketeering activity, including blockades designed to stop ingress and egress to the clinics, to close clinics that provide abortion and this force Plaintiffs to give up property rights.

paragraph 28[30] "encouraging others to participate in" will be stricken, as it does not apparently relate to violent activity. Paragraph 36[31] directly correlates Scheidler's conference workshop presentation and a blockade at the Women's Awareness Clinic in Fort Lauderdale, Florida. Although Plaintiffs do not specifically allege that the blockade was violent, the court cannot conclude with certainty, given the violent factual context of many of these blockades, that this blockade was completely peaceful. Thus, in this posture, the court cannot strike the allegations contained therein.

Paragraph 42[32] is closely linked in time with a violent

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[30]Paragraph 28 provides:

> In pursuit of their goal to drive every clinic out of business, Defendants (except Vital-Med) have traveled throughout the country, and/or used interstate telephone lines and U.S. Mail services for the purposes of engaging in, and/or *encouraging others to participate in*, their enterprise, which is devoted to the commission of racketeering activity at clinics such as DWHO and Summit. [Emphasis added]

[31]Paragraph 36 provides:

> From May 10 to 12, 1984, the first National Pro-Life Conference, entitled "Action for Life" was held in Ft. Lauderdale, Florida. Scheidler presented a conference workshop on "Effective Confrontation: A 'How-To' of Picketing, Leafletting, Sit-Ins and Blitzes." He also spoke at a "Ready for Action" rally. As part of their training, approximately 200 conference participants were taken by bus from the convention to the Women's Awareness Clinic, a Fort Lauderdale clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.

[32]Paragraph 42 provides:

(continued...)

invasion of the Ladies Center of Pensacola, Inc. and therefore will not be stricken. Paragraphs 45 and 47[33] are likewise linked in time with Scheidler's criminal trespass and harassment occurring on April 11, 1986 at DWHO. Although these activities are not violent per se, they are criminal. However, a showing of non-violent criminal activity alone is not enough. The freedom of speech is one of this country's most highly prized freedoms, and the Supreme Court has stated in no uncertain terms that preventing violence is the only valid reason for squelching that right. Paragraphs 45 and 47 will be stricken because the facts as alleged do not provide the factual basis to infringe the freedom of speech as required by *Milk Wagon Drivers*.

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[32](...continued)

On March 25, 1986, Scheidler, PLAL, and others led a workshop in Pensacola, Florida, designed to encourage local residents to join them in using racketeering activity to drive clinics that perform abortion out of business.

[33]Paragraph 45 provides:

> In April, 1986, Scheidler traveled to Delaware to organize and train persons to use his methods for shutting down clinics such as DWHO and to galvanize them into action.

Paragraph 47 provides:

> On April 12, 1986, Scheidler threatened that anti-abortionists "will get rid of [clinics such as DWHO]. I proclaim that Delaware is going to become the first state in the union to be free of abortion activities.

Paragraph 57[34] does not contain an allegation regarding the length of time that passed between the threats and incitation and the physical assault that occurred. In light most favorable to the Plaintiffs, the court cannot strike the paragraph.

Paragraph 58 contains a direct link between speech and an unprotected violent "lock and block," and therefore will not be stricken. Paragraph 87N (*see supra* at 67) contains no non-speech allegations and therefore will be stricken in its entirety. The phrase "by encouraging, organizing, and inciting" will be stricken from paragraph 87O. The phrase "by encouraging and inciting members of the enterprise to 'treat abortion like murder,' in the context of actual murder and attempted murder of doctors who perform abortion" will be stricken from paragraph 87Q.

V. Constitutionality of RICO

The final constitutional question that is at issue in this case is the facial constitutionality of RICO. The Scheidler Defendants challenge both statutes based on overbreadth and vagueness.

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[34]Paragraph 57 provides:

In December 1987, after numerous threats by Scheidler that he would close a Chicago women's health center and after incitation by Scheidler to give that clinic "a hard time" and to "molest" it, co-conspirator Anthony Lesniewski physically assaulted a security guard at the American Women's Health Center by attempting to run him over with a vehicle.

A. Vagueness

The Scheidler Defendants' vagueness argument points briefly to four aspects of RICO which could be the seed for this court to find that the statute is void for vagueness: (1) defining the "pattern; " (2) the scope of the "enterprise;" (3) applying the conspiracy crime to the enterprise; and (4) the impossibility of determining the "precise mental state that must be proved" in being liable for agreeing to engage in the enterprise. Amazingly, the Scheidler Defendants do no more than set forth these areas of difficulty without citing a single case in support of their position. Nor do they expand their accusations beyond pointing to the "fuzziness of [RICO's] contours of coverage about their [sic] outer fringes, [and] the vagueness of its provisions." Scheidler's Memo in Support at 15.

Although Justice Scalia invited facial challenges to RICO based on vagueness in *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 109 S. Ct. 2893, 2908-09 (1989) (Scalia, J. concurring), the statute has been consistently upheld, despite a shower of challenges. *See, e.g., United States v. Sanders*, 962 F.2d 660, 678 (7th Cir. 1992); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir.), *cert. denied*, 500 U.S. 919, 111 S. Ct. 2019 (1992); *United States v. Andrews*, 749 F. Supp. 1517, 1522-24 (N.D. Ill. 1990) (Aspen, J.). More importantly, the Seventh Circuit has reaffirmed RICO's constitutionality "despite Justice Scalia's statements concerning the pattern requirements in his concurrence in *H.J. Inc.*" *United States v. Ashman*, 979 F.2d 469, 487 (7th Cir. 1992) (citing cases).

In light of this overwhelming precedent, the only basis upon which this court could sustain a vagueness attack on the statute

would be to read the Supreme Court's conclusion in this case that there is no economic motive requirement for RICO. The parties have made no such argument as somehow changing the analysis to be applied in evaluating constitutionality. Under the decided cases, there is no logical argument that might implicate *vagueness* (as opposed to overbreadth) in light of the lack of economic motive requirement. Thus, this court will follow *Ashman* and conclude that RICO is not unconstitutionally vague. Moreover, the Defendants have not outlined even the roughest thumbnail sketch of how the other three "seeds" could implicate a vagueness argument--not even a single law review article is cited supporting their position generally. Defendants apparently assume that this court will not only consider their argument, it will construct it as well. The court declines the invitation.

B. Overbreadth

The overbreadth challenge is more substantial. The overbreadth doctrine recognizes the "governmental purpose to control or prevent activities subject [to] regulation" while acknowledging that goal "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958). An overbreadth challenge questions the statute facially because, given a reasonable interpretation of the scope of the statute, the statute reaches potentially protected speech. The analysis to be engaged in is "whether Congress has adopted a constitutional means in achieving its concededly legitimate [goal]." *United States v. Robel*, 389 U.S. 258 (1967) (Warren, C.J.).

An overbreadth challenge may be brought based on a party's belief that the statute is unconstitutional as enforced against it, but also on the ground that the statute's application to third persons not before the court violates the First Amendment. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 & n.17, 104 S. Ct. 2118, 2125 & n.17 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Adult Video Ass'n et al. v. Barr*, 960 F.2d 781, 787 (9th Cir. 1992). For the Plaintiffs to prevail, there is no need for them to argue that the statute is unconstitutional *in this case*. Rather, the court invalidates the entire statute "on its face," so that the overbroad law becomes unenforceable until a property authorized court construes it more narrowly. Gerald Gunther, *Constitutional Law* 1191 (12th Ed. 1991), *see Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). In order to strike a statute based on overbreadth, the court must find that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 616, 93 S. Ct. at 2918. *Broadrick* emphasized that overbreadth invalidations were generally inappropriate where the allegedly impermissible implications of the challenged statute affected "conduct" rather than "speech." *Broadrick*, 413 U.S. at 616, 93 S. Ct. at 2918. In other words, if the statute in question is largely directed toward legitimately criminal activity, and merely touches the First Amendment ever so slightly at the margin, that statute need not be stricken because the overbreadth is not "substantial."

The Supreme Court recently considered the possibility that the forfeiture provisions of RICO are overbroad in *Alexander v. United States*, 113 S. Ct. 2766 (1993). The *Alexander*

defendants challenged RICO because, they argued, the forfeiture provisions are not limited solely to obscene materials and the sale of such materials. *Alexander v. United States*, 113 S. Ct. at 2774. However, the Court recognized that this was an "unprecedented use of the overbreadth principle." *Id.* Importantly, the court stated in dicta:

> *But the RICO statute does not criminalize constitutionally protected speech* and therefore is materially different from the statutes at issue in our overbreadth cases. *Cf., e.g., Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75, 107 S. Ct. 2568, 2572 (1987).
>
> Petitioner's real complaint is not that the RICO statute is overbroad, but that applying RICO's forfeiture provisions to businesses dealing in expressive materials may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech.

Alexander v. United States, 113 S. Ct. at 2774 [Emphasis added]. The Court concluded that the chilling effect of forfeiting protected materials is no greater than the chilling effect of a prison term, or a large fine. *Id.* Although Defendants' brief is woefully devoid of an articulation of *why* RICO is overbroad, this court will attempt to anticipate their argument so it may be addressed here.[35] This court believes that

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[35]It seems clear that Defendants do not care how this court decides on these constitutional issues, given the lack of attention they gave their briefing of them. Defendants simply want this court to rule so they may reach the Court of Appeals and the Supreme Court on these issues. This court assumes that the Defendants will brief the issues with greater attention

(continued...)

Defendants wish to make a "chilling" argument similar to that raised in *Alexander* regarding freedom of association. Defendants argue that allowing RICO to be used in this context threatens "others engaged in a variety of First Amendment activity." This court interprets that statement to mean that the freedom to associate with groups who engage in protected free speech activity as well as illegal acts is "chilled" by the threat of RICO prosecution. However, Defendants miss the point of *Alexander*'s dicta quoted above: there will be no threat of prosecution if there is no illegal activity committed on the part of the individual defendant. RICO, standing alone, does not criminalize or chill speech, period. Speech is not implicated by the statute one iota. To be sure, if the individual defendant engages in illegal activity in furtherance of the purpose of the organization, that activity is in no way immunized by either the fact that the defendant also spoke out in support of his cause, nor by the fact that the defendant is a member of an organization who supports, encourages, or advocates the illegal activity. As noted above, support, encouragement, and even "incitement" is not criminal unless the illegal activity so closely follows the speech in question that the speaker may be thought of as the "cause" of the illegality. But RICO itself has nothing to do with that conclusion. RICO is not overbroad.

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[35](...continued)
to detail at higher levels. However, the Defendants are reminded that they may appeal only those issues which were properly decided by this court; they may not raise new arguments at the appellate level that were not raised here. *U.S. Equal Employment Opportunity Comm'n v. Wessel et al.*, 55 F.3d 1276, slip op. at 9 n.11 (7th Cir. 1995) (citing *Citizens Ins. Co. v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994). Defendants have done themselves a great disservice by not adequately briefing these issues because they will be bound on what they may appeal by what this court decides.

Finally, this court declines to address Defendant's argument that RICO is unconstitutional because it does not require a showing of "specific intent" to violate the statute. Specific intent is required to show a violation of a criminal statute. *Scales v. United States*, 367 U.S. 203, 221 n.11, 81 S. Ct. 1469 n.11 (year). Although RICO may be used criminally, this is a civil case. As such, the issue of specific intent is not relevant. Defendants, in their brief, attempt to confuse the issue by blending in the overbreadth analysis with their argument regarding specific intent. However, overbreadth analysis, and its accompanying relaxation of the standing requirement, is unique to First Amendment issues. There is no such relaxation of the standing requirement for consideration of other constitutional challenges. Defendants do not have standing to challenge the absence of a "mens rea" requirement here. *Scales*, *Alexander*.

VI. Conclusion

For the reasons stated in this memorandum opinion, IT IS HEREBY ORDERED THAT:

1. Defendant Conrad Wojnar is DISMISSED from this action;

2. Defendant Vital-Med is DISMISSED from this action;

3. Paragraphs 29, 30, 33, 45, 47, and 87N of the Third Amended Complaint are STRICKEN;

4. The phrase "encouraging others to participate in" is STRICKEN from paragraph 28; the phrase "by encouraging,

organizing, and inciting" is STRICKEN from paragraph 87O; the phrase "by encouraging and inciting members of the enterprise to treat abortion like murder,' in the context of actual murder and attempted murder of doctors who perform abortion" is STRICKEN from paragraph 87Q.

The court also concludes that RICO is facially constitutional as analyzed under both vagueness and overbreadth standards.

Dated: July 25, 1995

ENTER:

David H. Coar
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 86 C 7888

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly-situated clinics, Plaintiffs,

v.

JOSEPH M. SCHEIDLER; PRO-LIFE ACTION LEAGUE, INC.; RANDALL A. TERRY; ANDREW SCHOLBERG; CONRAD WOJNAR; TIMOTHY MURPHY; MONICA MIGLIORINO; VITAL-MED LABORATORIES, INC.; PROJECT LIFE; and OPERATION RESCUE, Defendants.

September 19, 1997, Decided

September 23, 1997, Docketed

MEMORANDUM OPINION AND ORDER

In the decade following the inception of this litigation, RICO

has become an increasingly controversial tool in civil litigation because of its potential scope. The instant case is paradigmatic of RICO's seemingly unlimited applicability.

Plaintiffs consist of two certified subclasses:[1] (I) the class of all women's health centers in the United States at which abortions are performed and, (II) the class of women who are not members of the National Organization for Women ("NOW") and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities. *NOW v. Scheidler*, 172 F.R.D. 351 (N.D. Ill. 1997). NOW also represents its own members as an associational plaintiff, for which no class certification is required. *See NOW v. Scheidler*, 897 F. Supp. 1047 n.1 (N.D. Ill. 1995). Defendants[2] are antiabortion activists accused of multitudinous

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[1]The named plaintiffs are as follows: The National Organization for Women (hereinafter "NOW"), a nationwide nonprofit organization dedicated to the advancement of women's rights; Delaware Women's Health Organization ("DWHO"), a Florida corporation that operates a women's health center providing women's health services such as pelvic examinations, Pap tests, breast cancer screening, birth control counseling, pregnancy testing, patient education, and abortions; and Summit Women's Health Organization ("Summit"), a Wisconsin partnership that, like DWHO, operates a women's health center providing women's health services. (Plaintiff's Third Amended Complaint ("Compl.") ¶¶ 7-10; Defendant Monica (Migliorino) Miller's Statement of Material Facts as to Which There Is No Dispute ("12(M) Migl.") ¶ 1(a)-(c); Plaintiffs' Rule 12(N) Statement of Additional Facts that Require Denial of Summary Judgement in Response to Monica (Migliorino) Miller ("12(N) Migl.") ¶ 1(a)-(c)).

[2]The named defendants are: Joseph M. Scheidler, a resident of the State of Illinois and director of the Pro-Life Action League, Inc. ("PLAL"); PLAL, an Illinois corporation; Randall A. Terry, a resident of the State of

acts that infringe upon women's constitutional right to have an abortion and the property interests of abortion clinics and clinic personnel in providing abortion-related services to women. Plaintiffs bring this lawsuit seeking class-wide injunctive and monetary relief from defendants' unlawful racketeering activities.

Procedural Background[3]

The initial complaint in this suit was filed in 1986 by plaintiffs NOW and two women's health centers. That complaint alleged that the defendants conspired to drive out of business health centers that provide abortion services, through acts that included extortion, physical and verbal intimidation, destruction of property, phone campaigns that tied-up clinic phone lines, making false appointments at the clinics, and the disruption of the clinics' relationship with their landlords--all in

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New York and director of Project Life and Operation Rescue; Andrew Scholberg, a resident of the State of Illinois and Assistant Director of the PLAL; Conrad Wojnar (dismissed from suit), resident of the State of Illinois and Director of Des Plaines Pro-Life Women's Center; Timothy Murphy, resident of Illinois and employee of PLAL; Monica Migliorino, resident of Wisconsin and the director of Citizens for Life; Vital-Med Laboratories, Inc. (dismissed from suit), an Illinois corporation; Project Life, an antiabortion organization with its principal place of business in the State of New York; and Operation Rescue, an antiabortion organization with its principal place of business in the State of New York. (Compl. ¶¶ 11-20; 12(M) Migl. ¶ 1(d)-(g)).

[3]For a more detailed account of the procedural history of the underlying action, see generally, *NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798 (1994); *NOW v. Scheidler*, 968 F.2d. 612 (7th Cir. 1992), *cert. granted*, 508 U.S. 971, 113 S. Ct. 2958 (1993); *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995); *NOW v. Scheidler*, No. 86 C 7888, 1995 WL 59228 (N.D. Ill. Feb. 10, 1995).

violation of the Sherman Antitrust Act and sections 1962 (a), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs also raised several pendent state claims.

For various reasons, the district court dismissed plaintiffs' Second Amended Complaint on May 28, 1991.[4] *NOW v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). On June 29, 1992, the Court of Appeals for the Seventh Circuit affirmed the district court's dismissal. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992). Plaintiffs obtained a writ of certiorari from the United States Supreme Court on the limited question of whether a RICO violation required motivation by an economic purpose. *NOW v. Scheidler*, 508 U.S. 971, 113 S. Ct. 2958 (1993) and on January 24, 1994, the Supreme Court reversed the Seventh Circuit, holding that RICO does not require proof that either the alleged racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose.[5]

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[4]The court held the Sherman Act inapplicable to the conduct alleged in the complaint because defendants' conduct was incidental to a valid effort to influence governmental action and therefore immune. *NOW v. Scheidler*, 765 F. Supp. 937, 939-41 (N.D. Ill. 1991). The court dismissed the § 1962(a) RICO claim because defendants' receipt of donations from supporters was not income derived from racketeering. *Id.* at 941. The § 1962(c) RICO claim was dismissed because the court concluded that RICO requires that economic motive be alleged. *Id.* at 941-44. The RICO conspiracy count was dismissed because all substantive RICO counts failed. *Id.* at 944. Finally, the state law claims were also dismissed because the dismissal of the claims based on federal law destroyed the basis for jurisdiction over the state law claims. *Id.* at 944-45.

[5]In a concurring opinion, Justice Souter emphasized that although the First Amendment does not require reading an economic motive into the

NOW v. Scheidler, 510 U.S. 249, 114 S. Ct. 798 (1994). The defendants petitioned for a rehearing, which was denied on March 21, 1994. *NOW v. Scheidler*, 510 U.S. 1215, 114 S. Ct. 1340 (1994).

On October 3, 1994, in an unpublished opinion, the Seventh Circuit recapitulated the Supreme Court's opinion and directed the district court to address the issue of whether the predicate acts alleged in the complaint in fact violate the Hobbs Act (18 U.S.C. § 1951) on remand.[6] Before the district court could comply with the mandate of the Court of Appeals, plaintiffs filed a motion for leave to file a third amended complaint, which was granted on October 21, 1994. On July 25, 1995, this court dismissed defendants Conrad Wojnar and Vital-Med from the suit, and struck paragraphs 29, 30, 33, 45, 47, and 87N of the third amended complaint, in addition to various phrases in the complaint. *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995). The court also concluded that RICO is facially

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unambiguous RICO statute, legitimate free speech issues may be implicated in this case. *NOW v. Scheidler*, 510 U.S. 249, 263-65, 114 S. Ct. 798, 806-07 (1994) (concurring, Souter, J.). Justice Souter advised that those concerns should be addressed as they arise. *Id.*

In the instant case, such concerns have arisen via the numerous affirmative defenses asserted by the defendants. Plaintiffs have moved to strike these defenses. Pursuant to its order dated March 20, 1997, this court has taken up plaintiffs' motion to strike and defendants' motions for summary judgment concurrently. (*See* Memorandum Opinion and Order, NOW v. Scheidler, 86 C 7888, of even date).

[6]The court specifically reaffirmed its original dismissal of the Sherman Act count and RICO § 1962(a) cause of action. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761, *2 (7th Cir. 1994) (unpublished disposition).

constitutional as analyzed under both vagueness and overbreadth standards. *Id.* at 1089-91. On March 31, 1997, this court certified the abovementioned plaintiff classes. *NOW v. Scheidler*, 172 F.R.D. 351 (N.D. Ill. 1997).

Defendants Randall Terry, Operation Rescue, and Project Life (collectively, "defendants TPO") now move by joint motion for summary judgment on Plaintiffs' third amended complaint (the "Complaint") pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendant Monica Migliorino Miller ("Migliorino") also moves for summary judgment by separate motion. Both sides have submitted extensive exhibits to the court, and on the basis of these materials as well as the legal arguments presented in the briefs, the court grants defendants' motions, in part, and denies them, in part.[7]

Legal Standards for Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Cox v. Acme Health Serv., Inc.*, 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-moving party, a reasonable jury could

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[7]Because defendants TPO are named in counts I and II only, the court considers their motion only as to those counts. Likewise, defendant Migliorino's motion for summary judgment is deemed to pertain to counts I through IV--the counts in which she is named.

return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995). The movant has the burden of establishing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). If the movant satisfies this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552-53; *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). A scintilla of evidence in support of the non-moving party's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511.

Facts

The following is a distilled recitation of the facts of this case:[8]

Defendant Randall A. Terry ("Terry") is a citizen of the State

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[8]Because the motions before the court were brought by a subset of the named defendants, the evidence submitted in connection with the motions pertains, in the main, to the members of that subset only. Accordingly, the recitation of facts contained herein necessarily paints an incomplete picture of the underlying lawsuit.

of New York. (Defendants TPO's Local Rule 12(M) Statement ("12(M) Defs. TPO") ¶ 1). Terry founded defendant Project Life in 1984. (*Id.* ¶ 4). During its existence, Project Life engaged in lawful protest against, and education about abortion, provided support services for pregnant women and mothers, in addition to engaging in unlawful acts of protest against abortion. (12(M) Defs. TPO ¶¶ 4-5; Plaintiffs' Local Rule 12(N) Statement ("12(N) Pls. TPO" ¶ 4). Project Life continued to exist as late as September 1988. (12(M) Defs. TPO ¶ 6, (12(N) Pls. TPO ¶ 6). Terry served as Project Life's only executive director. (12(M) Defs. TPO ¶ 4).

In 1987, defendant Terry founded Operation Rescue ("OR"). (12(M) Defs. TPO ¶ 3). Operation Rescue is an organization that actively opposed abortion through direct action tactics which included blockades, sit-ins, and vigils. (12(M) Defs. TPO ¶¶ 3, 7-8; 12(N) Pls. TPO ¶ 7). At the inception of this litigation, Operation Rescue was not a formal legal entity[9] and Project Life was an unincorporated association. (12(M) Defs. TPO ¶ 4).

Throughout his involvement at Operation Rescue, Terry referred to himself as, among other things, its National Director or Executive Director. (*Id.* ¶ 9; 12(N) ¶ 9). Joseph Foreman ("Foreman") served as National Field Director and later the Acting Director at Operation Rescue. (12(N) Pls. TPO ¶ 2). Jeff White ("White") served as Regional Coordinator of Operation

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[9]While Operation Rescue is not a formal legal entity, its organizational character mirrors the structure and formality of traditional legal entities and it enjoys a separate existence from that of defendant Terry's. (*See* 12(N) Pls. TPO ¶¶ 2-3).

Rescue on the West Coast in or about 1988 or 1989. (*Id.*). Pat Mahoney ("Mahoney") was the organization's media consultant, and Gary Leber was its communications Director. (*Id.*).

In November of 1986, Terry attended a pro-life rally in Pensacola, Florida. (12(M) Defs. TPO ¶ 11). At this rally, Terry presented a speech in which he shared his vision for the organization which later became known as "Operation Rescue." (*Id.*; 12(N) Pls. TPO ¶ 11). While his views initially received mixed reviews, they were later supported by certain core antiabortion activists and organizations. (12(M) Defs. TPO ¶ 11; 12(N) Defs. TPO ¶ 11). Operation Rescue's first organized rescue[10] was conducted on November 28, 1987 at the Cherry

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[10]The term "rescue" is apparently a term of art in antiabortion circles with a meaning that is not apparent from the word itself. Defendant Terry has defined the term "rescue" or "rescue missions" as "heroic attempts by God-fearing people to save babies and mothers from abortion on a *particular day* by *peacefully, but physically* blockading abortion mills with their bodies to intervene between abortionists and the innocent victims." (Pls. TPO Ex. 46 at 2 (emphasis in original)). In this memorandum opinion, the term "rescue" connotes a variety of antiabortion protest activities including both legal and illegal tactics aimed at preventing women from exercising their right to have an abortion and preventing abortion providers from providing such services to women. *See* Leslie Gielow Jacobs, *Nonviolent Abortion Clinic Protests: Reevaluating Some Current Assumptions about the Proper Scope of Government Regulations*, 70 Tul. L. Rev. 1359, 1366-67 (1996) (footnotes omitted) ("'Rescues' involve a host of . . . activities, ranging from picketing, distribution of literature, chanting, and attempts at sidewalk persuasion-also called 'counseling' to trespasses on clinic property to blockade it, name-calling, destruction of clinic property, threats of violence, and actual violence directed at clinic patients and personnel."); Regina R. Campbell, *"FACE"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech?*, 64

(continued...)

Hill abortion Clinic in New Jersey. (12(M) Defs. TPO ¶ 13). This rescue consisted of approximately three hundred (300) individuals and participants who were invited to sit in front of the door of the clinic to prevent entry. (*Id.*; 12(N) Defs. TPO ¶ 13).

The Pro-Life Action Network ("PLAN") is an active, nationwide coalition of antiabortion groups which began operating as early as 1984, adopted its formal name in 1985, and, since 1987, has had an elected "Leadership Committee" or "Leadership Council" to govern its affairs. (12(N) Pls. TPO ¶ 16). The PLAN Leadership Committee appears to have (or to have had at one time) five members: Randall Terry, Joseph Scheidler, John Ryan, Peter Lennox, and Andy Burnett. (Pls. TPO Exs. 10 (Scheidler Depo., 9/24/87, at 239, 247-48). PLAN sponsored annual conferences or conventions over the past decade at which members of the Leadership Committee met, shared information, and planned and scheduled events. (*Id.*).

In April of 1987, Terry spoke at a meeting sponsored by PLAN where he shared his vision for Operation Rescue. (12(M) Defs. TPO ¶ 14; 12(N) ¶ 14). There is evidence that Terry served as a member of the PLAN Leadership Council since PLAN's inception in 1987. (*See* 12(M) Defs. TPO ¶ 17; 12(N)

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[10](...continued)
U. Cin. L. Rev. 947, 953-54 (1996) (footnotes omitted) ("'[R]escue' demonstrations consist of two types of clinic blockades. The first is an actual physical blockade of the entrances to an abortion clinic to prevent anyone from entering the clinic. The second type of blockade involves constructively blockading the clinic by demonstrating in a loud and disruptive manner and harassing patients and personnel entering the clinic in an attempt to drive women seeking abortions away from the clinic.").

Pls. TPO ¶¶ 16-17). Terry spearheaded the decision to change the location of a clinic blockade sponsored by PLAN from St. Louis to Philadelphia. (12(N) Pls. TPO ¶ 23). Terry attended and participated in PLAN Committee meetings to discuss problems, initiate programs, devise new protest tactics, discuss ways to increase the publicity of pro-life activist successes, and determine the feasibility of Operation Rescue. (*Id.* ¶ 23). In addition, Terry was identified as a point person for specific activities on the "PLAN Agenda" dated August 21, 1987. (Pls. TPO Ex. 65). Moreover, there is evidence that PLAN's employment of certain "rescue" tactics resulted from Terry's advocacy of the same. (12(N) Pls. TPO ¶¶ 23, 32).

Operation Rescue had an independent affiliation with PLAN. Through Terry and Foreman, Operation Rescue attended several PLAN conventions where Foreman and Terry advocated the use of "Operation Rescue tactics" which were ultimately adopted by PLAN. (12(M) Defs. TPO ¶¶ 16, 26, 31, 32). Through Terry, Operation Rescue adopted for PLAN the strategy of orchestrating short term clinic invasions by local antiabortionists.[11] (*Id.* ¶ 15, 32). Through Foreman, Operation Rescue attended at least two PLAN conferences with PLAN leaders where they all planned and agreed to agendas of activities for the following year. (12(N) Pls. TPO ¶ 23). Operation Rescue also joined efforts with PLAN and Rescue America to organize and orchestrate a protest event called the "Summer of Justice" in Little Rock, Arkansas. (*Id.* ¶ 32).

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[11]For example, specific evidence of PLAN's adoption of this strategy is the rash of clinic shutdowns in Wichita, Kansas during the "Summer of Mercy" campaign sponsored by PLAN in 1991. (*See* 12(N) Pls. TPO ¶ 31; Pls. TPO Ex. 85 at 3-5; Pls. TPO Ex. 2-3).

Operation Rescue remained "active" in PLAN through its directors Keith Tucci and Flip Benham after they succeeded Terry at OR in 1991. (*Id.*).

Both Operation Rescue and Terry were actively involved in pro-life activism and direct action protest. In 1986, Terry expanded his activist tactics to include blockades and clinics invasions. (Pls. TPO Ex. 4 at 753). Terry and members of his organization, Project Life, chained themselves to furniture, medical equipment, or other objects and conducted "'drive-in' sit-ins" which resulted in some pregnant women leaving the abortion facilities "without getting an abortion. . . ." (12(N) Pls. TPO ¶ 4). At the fourth annual PLAN Convention in 1987, seventy-nine PLAN activists orchestrated a "rescue" whereby they blocked access to an abortion clinic in Atlanta, Georgia, closing the clinic for two and one half (2 1/2) hours. (*Id.*). Most of the women seeking abortions at the facility during that time period were "turned away." (Pls. TPO Ex. 44).

In 1988, it became the essence of OR to construct blockades outside of abortion clinics. (Pls. TPO Exs. 5 at 895; Pls. TPO Ex. 46). Later, OR began to use cars to prevent women from getting abortions by using cars to block access to abortion facilities. (Pls. TPO Ex. 5 896-98). Attendees of the 1989 PLAN convention in Livonia, Michigan ended the convention in "rescues" which closed the Urgent Care clinic for a day and later performed a "rescue" a the Women's Care Center in Livonia at which eighty demonstrators were arrested. (Pls. TPO Ex. 59 at 5-7).

Defendants OR and Terry engaged in a series of "rescues" in Atlanta beginning on July 19, 1988, during which they, among

other things, assaulted, tortiously harassed, and followed "sometimes for great distances patients their families and friends, employees medical practitioners and invitees of abortion facilities . . . ." (12(N) Pls. TPO ¶ 31 (quoting Pls. Ex. 80 at ¶ 14)). On February 11, 1989, defendant OR staged a rescue at the Women's Medical Center of Los Angeles, during which a patient was physically prevented from seeking post-operative medical care, pushed, shoved, assaulted, mobbed, and emotionally traumatized to the extent that she lost consciousness twice and was forced to attempt to seek care at another facility while experiencing excruciating abdominal pain. (*Id.* ¶ 31; Pls. TPO Ex. 81 at ¶¶ 1-2, 5-9). OR members, including Foreman, spoke at a rally preceding the blockade and participated in this blockade and others organized by defendant OR. (*See* 12(N) Pls. TPO ¶ 31; Pls. Ex. 82 at ¶¶ 2, 5-7, 9, 10, 16-20). In addition, OR has participated in several "rescue missions" during which clinic personnel were harmed and threatened, and clinics were closed. (*See* 12(N) Pls. TPO ¶ 31).

Andrew Scholberg, an official sponsor of OR, (*see* Pls. TPO Ex. 30), informed defendant Monica Migliorino ("Migliorino") that Vital-Med Services[12] was in possession of fetal remains. (12(N) Pls. TPO ¶ 29). Defendant Migliorino is a Wisconsin resident who has been the leader of a Milwaukee-based antiabortion group, Citizens for Life, which engages in various antiabortion activities. (12(N) Migl. 1(h)). Migliorino made plans with others to retrieve the remains and, over the course of ten (10) months, made approximately twenty (20) trips with

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[12]Vital-Med is a laboratory facility that processes fetal remains from clinics around the country and then transports the remains to another location for incineration. (12(N) Pls. TPO ¶ 29).

Murphy and others to Vital-Med at night to steal more than 4,000 fetal remains. (12(N) Pls. TPO ¶ 29). As a result of these thefts, Vital-Med canceled its contract with several clinics, including DWHO, Summit, and their affiliates. (*Id.* ¶ 27).

Discussion

In a lengthy earlier opinion, this court adjudicated defendants' motion to dismiss plaintiffs' third amended complaint.[13] That opinion set forth in detail the law governing plaintiffs' federal and state claims. Moreover, in an effort to focus this litigation, the court apprised the parties of what proof would be required to meet their respective burdens and of potential weaknesses in their positions. The parties have now arrived at the proverbial moment of truth with respect to the viability of the contested claims and defenses in light of the evidence obtained during discovery. As stated above, there must be a genuine dispute respecting each fact material to plaintiffs' case in order to preserve this case for trial.

I. Count I: RICO Claim under Section 1962(c)

The gravamen of plaintiffs' complaint lies in their RICO claims. This court previously set forth the law governing those claims, in part, as follows:

> The RICO statute prohibits persons engaged in an interstate "enterprise" from conducting that enterprise's affairs through "a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" means either any act or

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[13] *See supra* at 4-5.

threat of violation of several, enumerated felonious state crimes or any act which is punishable under several enumerated federal statutes. 18 U.S.C. § 1961(1). These enumerated activities are called "predicate acts." The "pattern" requirement is satisfied if the defendant commits at least two predicate acts within a ten year period (excluding any time spent in prison). 18 U.S.C. § 1961(5).

The circuits are split on the issue of whether a predicate act must be the proximate cause of the injury. The Seventh Circuit is in the group that does not require that the injury flow from a predicate act. *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169-70 (3d Cir. 1989) (injury from overt act that furthers RICO conspiracy is sufficient to confer standing, even if overt act is not a predicate act of racketeering); *see Reddy v. Litton Indus., Inc.*, 502 U.S. 921, 112 S. Ct. 332 (1991) (White, J. dissenting from denial of certiorari) (noting split in the circuits). This Circuit adopted the *Shearin* approach in *Schiffels* and stated that there is no need to show the injury to the plaintiff arose out of a "predicate act" as long as it arose from an "overt act" in furtherance of a RICO conspiracy, thereby being injured "by reason of" the conspiracy. *Schiffels*, 978 F.2d at 349.

NOW v. Scheidler, 897 F. Supp. 1047, 1070 (N.D. Ill. 1995) (footnote omitted). More recently, *Richmond v. Nationwide Cassel, L.P.*, concisely stated the elements of a § 1962(c) RICO claim: "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" 52 F.3d 640, 644-47 (7th Cir. 1995) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479,

496, 105 S. Ct. 3275, 3284-85 (1985)).

Plaintiffs allege that PLAN is an enterprise which defendants conduct in a pattern of racketeering activity. Defendants TPO challenge whether PLAN is, in fact, an enterprise within the meaning of the statute.[14] In addition, all defendants contest plaintiffs' ability to prove that they each conducted PLAN in a pattern of racketeering activity. Specifically, defendants argue that plaintiffs have no evidence of defendants' operation or management of PLAN which, defendants submit, is necessary to prove that their conduct violated RICO. Finally, defendants maintain that plaintiffs cannot prove that defendants committed the alleged predicate acts.

In order for defendants to be implicated under § 1962(c), there must be sufficient evidence from which to infer that (1) PLAN is an enterprise, and (2) defendants, directly or indirectly, conducted PLAN through a pattern of racketeering activity.

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[14]For the remainder of this memorandum opinion, the court intends the term "defendants" to include defendants Terry, Operation Rescue, Project Life, and Migliorino unless otherwise stated. It should be further noted that defendants TPO raise certain arguments that defendant Migliorino does not, however, this fact is inconsequential to the court's analysis.

For example, in her motion for summary judgment, defendant Migliorino does not contest whether PLAN constitutes an enterprise within the meaning of RICO. (*See* Motion for Summary Judgment by Defendant Monica Migliorino (Miller)). However, since plaintiffs must demonstrate that PLAN is an enterprise in order to implicate *any* defendant under RICO, including defendant Migliorino, her omission of this argument is of no effect.

A. Is PLAN an "Enterprise" within the Meaning of RICO?

In *National Organization for Women v. Scheidler*, the Supreme Court ruled on the scope of the term "enterprise" within the meaning of *RICO*. 510 U.S. 249, ___ , 114 S. Ct. 798, 803-04 (1994). The Court relied on the "unambiguous" language of 18 U.S.C. § 1961(4), which broadly defines the term "enterprise" to "include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* at ___, 114 S. Ct. at 803-04. Acknowledging the unambiguous meaning of the term "any", the Court gave voice to its earlier language in *United States v. Turkette* that an enterprise need not have an economic motive to constitute an "enterprise" under RICO. *Id.* at ___, 114 S. Ct. at 804 (citing *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528 (1981)). Indeed, the Supreme Court and courts of appeals alike have made clear that "enterprise" as defined under RICO applies to formal enterprises, such as corporations, as well as informal enterprises like criminal gangs, public entities, and illegitimate businesses. *Turkette*, 452 U.S. at 580-81, 101 S. Ct. at 2527-28; *Russello v. United States*, 464 U.S. 16, 24, 104 S. Ct. 296, 301 (1983); *United States v. Blackwood*, 768 F.2d 131, 137 (7th Cir. 1985), *cert. denied*, 474 U.S. 1020, 106 S. Ct. 569 (1985)).

The breadth of this definition notwithstanding, a group of associated businesses or organizations that operate in concert does not necessarily constitute an enterprise; it must have a structure and goals that are distinct from the RICO predicate acts which form the basis of the RICO claim. See *Richmond v.*

Nationwide Cassel, L.P., 52 F.3d 640, 645 (7th Cir. 1995); *United States v. Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994), *cert. denied*, 513 U.S. 993, 115 S. Ct. 496 (1994). The import of the "structure" requirement is that there must be some distinction, however little, between the enterprise and a mere conspiracy. *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992). "Otherwise two statutory elements--enterprise and pattern--would be collapsed into one." *United States v. Masters*, 924 F.2d 1362 (7th Cir.), *cert. denied*, 500 U.S. 919, 111 S. Ct. 2019 (1991). Thus, the enterprise must be "separate and distinct from the persons sought to be held liable." *Richmond*, 52 F.3d at 647; *see also United States v. Neapolitan*, 791 F.2d 489, 499-500 (7th Cir.), *cert. denied*, 473 U.S. 940, 107 S. Ct. 422 (1986) (holding that "enterprise" is "more than a group of people who get together to commit a 'pattern of racketeering activity.'").

"It would be nonsensical[, however,] to require proof that an enterprise had purposes or goals separate and apart from the pattern of racketeering activity." *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996). Accordingly, the purpose of the enterprise may be to pursue the pattern of racketeering activity so long as the enterprise is not the pattern of racketeering activity. *Accord Planned Parenthood v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1384 (D. Or. 1996) (citing *Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996)).

An enterprise is shown "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.*; *see also Hartz v. Friedman*, 919 F.2d 469, 471 (7th Cir. 1990)

(questioning whether an association in fact of attorneys had the "structure, purpose, and continuity needed in order to qualify as an 'enterprise' under RICO"). Thus, in order to prove the existence of an "enterprise", a plaintiff must adduce evidence of "'an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.'" *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (quoting *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990)). Structure may be evidenced by "the continuity of an informal enterprise, and the differentiation of roles . . . ." *United States v. Korando*, 29 F.3d 1114, 1117-18 (citing *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992).

Defendants are accused of being associated with and participating in PLAN. PLAN is a group of individuals and organizations that allegedly "conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 801-02 (1994). The group of individuals and organizations which comprises PLAN is not a legal entity; rather it is an "association in fact enterprise." *See* 18 U.S.C. § 1961(4). RICO defines an "association in fact enterprise" as a "union or group of individuals associated in fact although not a legal entity." *Id.* The Court has described it as "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528 (1981). Under both definitions, PLAN constitutes an enterprise.

Despite defendants' allegations that PLAN never became fully operational or had any cohesive group of leaders, (12(M) Defs. TPO ¶¶ 16, 18), the evidence supports a finding that PLAN is an active nationwide coalition of antiabortion groups which began operating as early as 1984, adopted its formal name in 1985, and, since 1987, has had an elected Leadership Committee to govern its affairs. (12(N) Pls. TPO ¶ 16; Pls. TPO Exs. 10 (Scheidler Depo., 9/24/87, at 239, 247-48); 53; 61 at 4; 71). PLAN holds organizational meetings. (*See, e.g.*, Pls. TPO Ex. 8 at 245-47, 64). Furthermore, over the past decade PLAN has sponsored annual conferences where members of the Leadership Committee met, shared information, and planned and scheduled events. (12(N) Pls. TPO ¶ 16).

For example, in 1984, several pro-life leaders convened in Fort Lauderdale to organize a "pro-life mafia to work in concert on important activist programs"; in 1985, a "second annual pro-life activist conference" was held in Appleton, Wisconsin where the PLAN name was adopted; in 1986, a PLAN conference was held in St. Louis, Missouri; in 1987, at a PLAN convention in Atlanta, Georgia, the PLAN Leadership Committee was elected; and in 1988, 1989, 1990, 1991, 1992, 1993, and 1996 PLAN conventions were held in Chicago, Illinois; Livonia, Michigan; Jackson, Mississippi; Wichita, Kansas; San Antonio, Texas; Denver, Colorado; and again in Chicago, Illinois, respectively, at which members of the PLAN Leadership Council served prominent roles and PLAN members engaged in protests and organizational meetings. (*Id.*; Pls. TPO Exs. 3 (Terry Depo., 1/10/91, at 400-01), 10 (Scheidler Depo., 9/24/87, at 765-66), 12 (Treshman Depo. at 255-58), 52-59, 61-64, 71, 74).

This evidence demonstrates continuity of existence, the existence of leadership roles, and cohesive structure that is distinct from the alleged predicate acts.[15] The court therefore finds that PLAN is an associated in fact enterprise for purposes of RICO. *Accord Feminist Women's Health Ctr. v. Roberts*, 1988 WL 156656, * 4 (W.D. Wash. Mar. 11, 1988); *see also Planned Parenthood v. American Coalition of Life Activists*, 945 F. Supp. 1355, 1384 (D. Or. 1996) (motions to dismiss and for judgment on the pleadings).

B. Operation or Management as "Conduct"

Once the existence of an enterprise is established the plaintiff bears the burden of demonstrating that the defendant "conducted or participated, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. 1962(c). The evidence suggests that PLAN has served as the venue for many of the alleged predicate acts. (*See, e.g.*, 12(N) Pls. TPO ¶ 16; Pls. TPO Exs. 16 (Murphy Depo., 11/18/96, at 86, 88-89, 91, 93, 95, 97, 99)). Thus, in order to prevail against defendants at trial, plaintiffs must be able to prove that defendants operated or managed PLAN (or participated in the operation or management of PLAN) in a manner proscribed by RICO.

In *Reves v. Ernst & Young*, the Court defined the term

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[15]Plaintiffs allege that defendants committed the following predicate acts: extortion, murder, kidnaping, arson, taking possession of interstate shipments of fetal remains, obstruction of interstate commerce, and travel and use of facilities in interstate commerce with intent to commit violent crimes. These alleged acts are separate a apart from PLAN's existence as an antiabortion coalition engaged in lawful protest and planning.

"conduct" under *RICO*. 507 U.S. 170, 113 S. Ct. 1163 (1993). At issue in *Reves* was the extent to which the defendant, an outside accounting firm, could be liable under RICO for conducting the affairs of its client.[16] *Id.* The Court explained that the term "conduct" involves some act of direction, while the term "participate" as it is used in the phrase "participate . . . in the conduct of . . . affairs" inheres a role in that direction.[17] *Id.* at 179, 113 S. Ct. at 1170. Further, its legislative history reveals that § 1962 anticipates a degree of operation or management of an enterprise in its conduct requirement. *Id.* at 179-82, 113 S. Ct. at 1171-72. However, while these terms necessarily imply some degree of control over the enterprise's affairs, the culpable actor need not hold a formal, recognized, or elevated position within the enterprise. Indeed, such person may be a "lower rung" employee or even a nonemployee who acts at the direction of upper management. *Id.* at 185-86, 113 S. Ct. at 1173. It is the degree and form of participation and the

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[16]The Court ultimately concluded that the defendant's incorrect valuation of a farm cooperative's assets could not give rise to RICO liability because the defendant had not "conducted, or participated, directly or indirectly, in the conduct" or direction of the affairs of the farm cooperative--the alleged RICO enterprise. *Reves* at ___, ___, 113 S. Ct. at 1170, 1172, 1173-74.

[17]The Court expressly rejected the argument that the term "participate" encompassed the broad term "aid and abet." *Reves*, 507 U.S. at 178, 113 S. Ct. at 1170. Not only did the Court hold that these terms were not synonymous, but it found that the former had a narrower meaning in light of Congress's distinction between the act of conducting an enterprises's affairs and participating in the conduct of an enterprise's affairs. *Id.* at 178-79, 113 S. Ct. at 1170. Justice Souter, in dissent, described the majority's finding of "a clear congressional mandate to limit RICO liability . . . to participants in the 'operation or management' of a RICO enterprise." *Id.* at ___, 113 S. Ct. at 1174.

nature of the enterprise that determine whether such person has engaged in the direction of the enterprise's affairs.

In *MCM Partners, Inc. v. Boscarino*, the Seventh Circuit applied the holding in *Reves* providing further context for the offensive use of *RICO*. 62 F.3d 967 (N.D. Ill. 1995). Like PLAN, the enterprise in *MCM Partners* was an association-in-fact purposed to make one constituent association "the exclusive provider of forklift and material handling and personnel moving equipment for all exhibition contractors at McCormick Place." *Id.* at 978. The Seventh Circuit found that the fact that two of the enterprise's six constituent associations committed predicate acts at the direction of the others did not insulate those two associations from RICO liability under *Reves*. *Id.* The court relied on the express holding in *Reves* that "lower rung" employees in an enterprise who act at the direction of upper management may be deemed to operate that enterprise. *Id.* Specifically, the Seventh Circuit stated that the two associations "still participated in the enterprise's operation by carrying out the directions given them." *Id.*

In so holding, the Seventh Circuit articulated a distinction between defendants "outside" the enterprise and those who are "inside" the enterprise by virtue of their membership therein and relied on the nature of the enterprise as a basis for its decision.[18] *Id.* Specifically, the court drew a distinction between

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[18]The First, Second, and Eleventh Circuits have also developed a concept of "outside" versus "inside" participation in an enterprise which allows RICO liability to be imposed on lower-rung employees. *See United States v. Starrett*, 55 F.3d 1525, 1548 (11th Cir. 1995) ("We agree with the First Circuit that one may be liable under the operation or management test

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the defendant in *Reves*, an accounting firm considered an "outsider" to the enterprise by the Court and the two associations at issue in *MCM Partners* which were alleged to be part of the enterprise itself. *Id.* at 979. The court further noted that "these defendants were vital to the achievement of the enterprise's primary goal" and "knowingly implemented management's decisions, thereby enabling the enterprise to achieve its goals." *Id.* Together, *Reves* and *MCM Partners* stand for the proposition that "outsiders" who assist in an enterprise's affairs, without more, are not liable under RICO while "insiders" who through the chain of command either make or knowingly carry out the enterprise's decisions may be held accountable. *Accord Oreto*, 37 F.3d at 750. Accordingly,

> a RICO enterprise may be operated by: (1) upper management; (2) lower-rung participants in the enterprise who are under the direction of upper management; or (3) others associated with the enterprise who exert control over it, as for example, by bribery.

Resolution Trust Corp. v. S&K Chevrolet Co., 918 F. Supp. 1235, 1245-46 (C.D. Ill. 1996).

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[18](...continued)
'by knowingly implementing decisions,' as well as by making them.'"); *United States v. Wong*, 40 F.3d 1347, 1373 (2d Cir. 1994) (relying on *Reves* to support rule that a defendant acting under the direction if superiors in a RICO enterprise may be subject to liability by virtue if their "participation"); *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994), *cert. denied*, 513 U.S. 1177, 115 S. Ct. 1161 (1995) (extending RICO liability to those "inside employees" who "knowingly implement[]. . . , as well as" make decisions of an enterprise).

In determining whether defendants have demonstrated that there is no genuine issue as to whether defendants engaged in conduct as defined above, this court must examine the quantum of evidence necessary to prove conduct. This court previously held that, in order to maintain this action, plaintiffs must eventually establish that defendants did more than simply attend PLAN meetings and/or endorse PLAN's positions. *NOW v. Scheidler*, 897 F. Supp. 1047, 1072 (N.D. Ill. 1995). Indeed, plaintiffs must now show that they have evidence that each defendant exercised some degree of control over PLAN's affairs or acted on behalf and at the direction of PLAN.

1. Defendants Terry, Project Life, and Operation Rescue (TPO)

The evidence of operation or management by defendants TPO that plaintiffs present in opposition to summary judgment is comprised of a mixed-bag of activity which includes planning, directing, and close involvement with the activities of PLAN. With respect to defendant Terry, the evidence demonstrates that there is significant dispute as to (1) whether Terry served as a member of the PLAN Leadership Committee since PLAN's inception in 1987, (*see* 12(M) Defs. TPO ¶ 17; Def. TPO Exs. A (Terry Aff.) at ¶ 13, B (Terry Depo.) at 484, E (Burnett Depo.) at ¶ 10, 12(N) Pls. TPO ¶¶ 16-17; Pls. TPO Exs. 3 (Terry Depo., 1/10/91, at 386; 10 (Scheidler Depo., 9/24/87, at 239, 242-43, 247-49), and (2) whether PLAN's employment of certain "rescue" tactics resulted from Terry's advocacy of the same, (12(N) Pls. TPO ¶¶ 23, 32). In addition, it is undisputed that Terry (1) spearheaded the decision to change the location of a scheduled clinic blockade sponsored by PLAN from St. Louis to Philadelphia, (*Id.* ¶ 23; Pls. TPO

Ex. 6 (Terry Depo 8/15/96 at 1180-82); (2) attended and participated in PLAN Committee meetings to address problems, initiate programs, devise new protest tactics, discuss ways to increase the publicity of antiabortion activist successes, and determine the feasibility of Operation Rescue, (12(N) Pls. TPO ¶ 23; Pls. TPO Exs. 9 (Burnett Depo., 3/5/96 at 168-69), 10 (Scheidler Depo., 9/24/87 at 240-47)); and (3) is identified as a point person for specific activities in a document entitled "PLAN Agenda" and dated August 21, 1987, (Pls. Ex. 65). This evidence is more than sufficient to demonstrate that defendant Terry conducted (or participated in the conduct of) PLAN.

Contrary to the defendants TPO's assertions, plaintiffs' evidence does more than show that Terry's tactics were similar to PLAN's. It demonstrates that Terry played an active role in PLAN. In defense, defendants TPO rely primarily on Terry's affidavit in which he disavows any involvement in the operation or management of PLAN's affairs. However, Terry's affidavit mainly establishes that many of his actions were motivated by his religious and moral convictions rather than any malice intent. Because a RICO violation does not require that the defendant possess any particular mental state, (*see* S. Rep. No. 617, 91st Cong., 1st Sess. 22 (1969)), such testimony is irrelevant to the court's inquiry. It is well established that Terry advocated the use of certain protest tactics that were later employed by PLAN. (*See* 12(N) Pls. TPO ¶ 31; Pls. TPO Ex. 85 at 3-5; Pls. TPO Ex. 2-3). Indeed, even if Terry is not proved to be a member of the PLAN leadership committee,[19] the evidence

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[19]While the evidence supports a finding that Terry was elected to the Leadership Council in 1987, there is no evidence that Terry maintained a position in the operation or management of PLAN since then. On the other

(continued...)

shows that his actions still figure significantly in the conduct of PLAN's affairs. Thus, under *Reves*, defendant Terry in not entitled to summary judgment in light of the evidence that his conduct, either as an insider or an involved outsider, affected the conduct of PLAN.

In addition, plaintiffs have proffered evidence that defendant OR (1) through Terry and OR's Field Director, Foreman, attended several PLAN conventions where Foreman and Terry advocated the use of "OR tactics" which were ultimately adopted by PLAN, (12(M) Defs. TPO ¶¶ 16, 26, 31, 32; Pls. TPO Ex. 56); (2) through Terry, adopted for PLAN the strategy of orchestrating short term clinic invasions by local antiabortionists, (12(M) Defs. TPO ¶ 15, 32; see also 12(N) ¶ 31; Pls. TPO Ex. 85 at 3-5; Pls. TPO Ex. 2-3); (3) through Foreman, attended at least two PLAN conferences with PLAN leaders where they all planned and agreed to agendas of activity for the following year, (12(N) Pls. TPO ¶ 23; Pls. TPO Ex. 8 (Foreman Depo. at 241-42, 247-48, 252, 269-71, 276)), (4) joined efforts with PLAN and Rescue America to organize and orchestrate a protest event called the "Summer of Justice" in Little Rock, Arkansas, (12(N) Pls. TPO ¶ 32 (Treshman Depo. 10/31/96 at 113-14)), and (5) remained active in PLAN through its directors Keith Tucci and Flip Benham after they succeeded

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[19](...continued)
hand, absent any evidence of resignation by Terry from the PLAN Leadership Council, a reasonable factfinder may infer continued direction of PLAN's affairs by Terry via the Leadership Council at least through 1988. These facts, if proved, show that Terry occupied a significant role in PLAN's operation and management. Thus, as to defendant Terry, the court finds that a genuine issue exists as to whether he conducted PLAN (or participated in the conduct of PLAN) in violation of RICO.

Terry at OR in 1991, (*Id.*; Pls. Ex. 11 (Scheidler Depo. 1/31/97 at 24)). In light of this evidence which goes to the material fact of defendant Operation Rescue's participation in PLAN, summary judgment may not be granted in favor of defendants.

With respect to defendant Project Life, however, there is no evidence from which to infer its operation or management (or participation in the operation or management) of PLAN. For example, in their 12(N) Statement, plaintiffs allege that "Project Life, through Terry, attended the 1986 PLAN Conference in St. Louis and took a leadership role in the 1987 conference." (12(N) Pls. TPO ¶ 4). In support of this allegation, plaintiffs cite to portions of defendant Terry's deposition and to a registration form for the 1987 PLAN conference. The first portion of Terry's deposition testimony to which plaintiffs cite discusses his actions with respect to defendant Operation Rescue and does not mention, even by inference defendant Project Life. (*See* 12(N) Pls. TPO ¶ 4; Pls. TPO Ex. 3 (Terry Depo. 1/10/91 at 379). The second portion of Terry's deposition to which plaintiffs refer could not be found at the citation provided the court. (*See* 12(N) Pls. TPO ¶ 4; Pls. TPO Ex. 5 (Terry Depo. 8/14/96 at 1042). In addition, the registration form upon which plaintiffs rely mentions defendant Project Life only in noting that it is located in upstate New York and defendant Terry serves as its Executive Director. Moreover, while there is evidence that Project Life was identified as an organization that could provide information on PLAN activity through 1988 after which point the organization ceased to exist, (12(M) Defs. TPO ¶ 6; Pls. TPO Ex. 45 at 3; *see also* Pls. TPO Ex. 2 at 44), this evidence amounts to nothing more than a scintilla of evidence in support of plaintiffs' claim against Project Life. Finally, although defendant Terry was director of Project Life

and this court has found that there is genuine issue of material fact as to his participation in the operation or management of PLAN, it does not follow, without more, that Project Life is a part of PLAN. As is clear from the preceding discussion, plaintiffs have failed to present the "more" that would be necessary to show Project Life's participation.

Thus, viewing plaintiffs' evidence in the light most favorable to the plaintiffs, the court finds that it does not demonstrate that Project Life played any role, let alone an actionable one, in the operation or management of PLAN's affairs. At most, this evidence establishes that defendant Terry was the Executive Director of Project Life when he first became involved with PLAN. While this evidence, among other things, may be sufficient to implicate defendant Terry, without more, it cannot support a claim against Project Life as a separate entity. Moreover, the evidence which plaintiffs present in support of their allegations that Project Life committed (or conspired to commit) predicate acts is similarly too weak for a reasonable juror to conclude therefrom that Project Life played an actionable role in PLAN's affairs. (See 12(N) Pls. TPO ¶¶ 4, 7, 26, 32). Accordingly, summary judgment is granted as to defendant Project Life on the ground that there is no genuine issue as to the "conduct" element of plaintiffs' RICO claim.

2. Defendant Migliorino

At the outset, this court noted that "Migliorino's awareness of the scope of the enterprise is tenuous" and, by inference, that her participation in the PLAN enterprise is dubious. *See NOW v. Scheidler*, 897 F. Supp. 1047, 1077 (N.D. Ill. 1995). After reviewing the extensive, well-developed record in this case, the

court draws the same conclusion.

Plaintiffs admit that neither defendant Migliorino nor any other female was elected to PLAN's Leadership Committee. (12(N) Pls. TPO ¶ 4). Plaintiffs contend, however, that Migliorino served as a "de facto leader of PLAN in many respects" and offer the following evidence as support: (1) Migliorino's participation in the Appleton, Wisconsin meeting, at which antiabortion activist leaders voted to form PLAN and formulated a twelve-month agenda of national antiabortion protests billed as "A Year of Pain and Fear for America's Abortion Providers", (12(M) Defs. TPO ¶ 3; 12(N) Pls. TPO ¶ 3; Pls. Migl. Ex. 21 at 1-2, 9-10); (2) Migliorino's organization and execution of at least two "rescues" in furtherance of the goals of closing clinics and preventing women from entering clinics during the twelve-month period following the Appleton meeting, (12(N) Pls. TPO ¶ 3; Pls. Ex. (Deposition of Monica Migliorino ("Migl. Depo.") 7/23/90 at 80, 85, 89-90); (3) Migliorino's organization of demonstrations, the ideas for which were formulated at a meeting among defendants Migliorino, Scheidler, Scholberg, and Murphy, in connection with the 1996 PLAN Convention (which was scheduled to coincide with the Democratic National Convention in Chicago, Illinois), (12(N) Pls. TPO ¶ 3; Pls. Migl. Ex. 5 (Migl. Depo. 12/16/96) at 394-95; 14 (Scholberg Depo. 10/15/96) at 44-46; 29), (4) Migliorino's statement that it was a "good idea" to have and "about time for" another PLAN Convention, (12(N) Pls. TPO ¶ 3; Pls. Migl. Ex. 57 (Scheidler Depo. 2/11/97) at 6A); and (5) Migliorino's presence on a list of invitees to all PLAN conferences (12(N) Pls. TPO ¶ 3; Pls. Migl. Ex. 13 (Scheidler Depo. 1/31/97) at 989). Of the myriad testimony and exhibits upon which plaintiffs rely, the foregoing constitutes the most

persuasive evidence of Migliorino's participation in PLAN. On its face, however, it is clear that this evidence does not support plaintiffs' burden. At best, a reasonable factfinder can deduce that defendant M6igliorino was actively involved in the antiabortion movement, knew and, at times, worked with co-defendants in this case, and shared the goals of PLAN. None of this amounts to participation in an enterprise as such is contemplated by the Court and the precedent in this circuit. *See Reves*, 507 U.S. 170, 113 S. Ct. 1163 (1993); *MCM Partners*, 62 F.3d 967 (7th Cir. 1993); *see also Resolution Trust Corp. V. S&K Chevrolet Co.*, 918 F. Supp. 1235, 1246-48 (C.D. Ill. 1996) (outside insurance agent who participated in bank fraud scheme by inducing bank to provide financing for the enterprise did not participate in direction of the enterprise); *A.I. Credit Corp. v. Hartford Computer Group, Inc.*, 847 F. Supp. 588, 601-02 (N.D. Ill. 1994) (outside brokers who provided financial services for enterprise did not exercise sufficient control); *Sassoon v. Altgeld*, 822 F. Supp. 1303, 1307 (N.D. Ill. 1993) (conduct of providing legal services to general partners and limited partnership, including drafting of investment offering, not sufficient under *Reves*). Moreover, evidence of defendant Migliorino's description of a "lock and block"[20] rescue mission, (*e.g.*, 12(N) ¶ 3; Pls. Migl. Exs. 22-24), and her attendance at PLAN conference meetings where she presented a position statement on justified homicide, (12(N) ¶ 3; Pls. Migl. Ex. 4 (Migl. Depo. 12/3/96) at 244; 7 (Foreman 3/19/96) at 48-49; 6 (Burnett Depo. 3/6/96) at 358-59), is insufficient to show operation or management absent evidence that she occupied a

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[20]"Lock and block" refers to tactics used to prevent ingress to abortion facilities whereby protestors lock or chain themselves to the edifice or another object and block the entryway to the facility.

decisionmaking role in PLAN or that she followed the instruction of management.

In addition, while there is competent evidence that Migliorino organized and carried out thefts of fetal remains, (*see*, *e.g.*, Pls. Migl. Exs. 1 (Migl. Depo. 10/11/89) at 223, 225-30; Ex. 3 (Migl. Depo. 7/23/90) at 211-13, 226-27), it is not enough to show that Migliorino committed acts that furthered the goals of PLAN without evidence that she was acting at the instruction of PLAN leaders or was directing PLAN's affairs in doing so. Indeed, these acts may be consistent with PLAN's stated purpose of closing abortion facilities by virtue of bringing negative publicity to such facilities. However, there is nothing to suggest that these acts were anything more than a result of Migliorino's independent efforts. The only evidence that provides even a remote link to PLAN with respect to these events is PLAN's stated goals of closing abortion clinics, (*e.g.*, Pls. Migl. Exs. 14 (Scholberg Depo. 10/15/96) at 135), and Migliorino's testimony that certain individuals in Philadelphia who had attended the first Operation Rescue rescue requested that Migliorino send them the fetal remains that she retrieved, (Pls. Migl. Ex. 1 (Migl. Depo. 10/11/89) at 225-30). None of this evidence connects PLAN to Migliorino's acts.

Finally, some of the evidence cited by plaintiffs actually cuts against their argument. For instance, testimony that the location of future PLAN conventions is decided by a consensus of all attendees of the previous PLAN convention diminishes rather than supports the importance of the role that Migliorino played in contributing to that consensus. (*See* 12(N) Pls. TPO ¶ 3; Pls. Migl. Ex. 14 (Scholberg Depo. 10/15/96) at 167, 175-77; 25). Other evidence that plaintiffs cite to demonstrate Migliorino's

affiliation with PLAN is simply too tenuous to consider and entirely unsupportive of plaintiffs' allegations. For example, plaintiffs state that the "We Will Stand Up" campaign under which an abortion clinic blockade was organized and executed in Detroit on September 19, 1987 and in which Migliorino participated, is a project of PLAN. (12(N) Pls. TPO ¶ 3). However, the evidence which allegedly supports this allegation offers no proof that it was a PLAN project; rather the testimony demonstrates that the blockade was sponsored by Project Life. (*See* Pls. TPO Exs. 3, (Migl. Depo. 7/23/90) at 131-32); 16 (Migliorino's Answer to Interrogatories ("Migl. Interrog. Ans.") at 12; 35 at 1, 3, 4). Plaintiffs further allege that Operation Rescue took credit for Migliorino's "rescues", and that Migliorino was the North Central Director of the American Coalition of Life Activists ("ACLA"), an organization that grew out of a 1994 PLAN meeting at the Chicago Radisson Hotel. However, the only evidence that Operation Rescue took credit for Migliorino's rescues is a document entitled "National Rescue Recap" which lists reported rescue missions occurring approximately between May 1, 1989 and June 10, 1989 and which includes a reference to the location of two rescues staged by Migliorino, though not on the dates that Migliorino testified they occurred. (*See* 12(N) Pls. TPO ¶ 3; Pls. Migl. Ex. 61 (Terry Depo. 10/11/96) at 1639 & attachment). Nowhere in this document does Operation Rescue purport to take credit for these rescue missions. To the contrary, Operation Rescue expressly solicits information regarding local rescues, indicating that it does not possess knowledge of such rescues until informed by those individuals conducting them. (*See* Pls. Migl. Exs. 61 (Terry Depo. 10/11/96) attachment). As to the allegation that ACLA "grew out of" a 1994 PLAN meeting at the Chicago Radisson Hotel, there is only the following

dialogue from Migliorino's deposition to lend any support:

Q: ACLA grew out of this 1994 meeting, didn't it?

A: (Migliorino) One could say that.

(12(N) Pls. TPO ¶ 3; Pls. TPO Ex. 4 (Migl. Depo.) at 253). This again, is a mere scintilla of evidence upon which no reasonable factfinder could base a conclusion of participation. Likewise, evidence cited to support the proposition that Migliorino "attended a select leaders meeting of only 10 or 12 people, including PLAN Leadership Council . . . to plan strategy" for future PLAN activities does not even affirmatively place her at the meeting. (*See* 12(N) Pls. TPO ¶ 4; Pls. Migl. Ex. 13 (Scheidler Depo. 2/11/97) at 1184-89). Such incompetent evidence is in no way useful to the court in adjudicating the instant motion or to any reasonable factfinder at trial. Plaintiffs go on to state that Migliorino "also acted in a leadership capacity of PLAN by organizing several "rescues" in conjunction with PLAN Leadership Council member Scheidler and PLAN members PLAL, Treshman and Murphy, furthering PLAN's goal of closing clinics." (12(N) Pls. TPO ¶ 4). However, the evidence shows only that Migliorino organized several blockades in which Murphy, Treshman, and Scheidler participated; there is no evidence that either one of them planned these events with Migliorino and that they were participating on behalf of PLAN. (*See, e.g.*, Pls. Migl. Exs. 1 (Migl. Depo. 10/11/89) at 223, 225-30; 3 (Migl. Depo. 7/23/90) at 133-34, 211-13; 4 (Migl. Depo. 12/3/96) 48-52, 278-82; 16 (Migl. Interrog. Ans.) at 12-13). The only evidence that Migliorino and Scheidler organized any rescues together is Migliorino's testimony that Scheidler recruited persons to

engage in picketing at the July 21, 1984 rescue in Chicago, Illinois. (*See* Pls. Migl. Exs. 3 (Migl. Depo. 7/23/90) at 65-67, 69). This event predates the formation of PLAN,[21] however, and thus, cannot serve as evidence of Migliorino's operation or management of PLAN. Furthermore, it is simply not enough to show that a defendant planned acts with another defendant without demonstrating that such planning took place within the context of the enterprise. The court therefore concludes that no reasonable factfinder could deduce that PLAN was involved in any aspect of Migliorino's allegedly unlawful activities based on the proffered evidence. Without that connection, there is no basis upon which to establish Migliorino's operation or management of PLAN. Indeed, it is clear from the foregoing that the record does not support a finding that defendant Migliorino is either upper management, a lower-rung participant acting under the direction of upper management, or one associated with PLAN who exerts control over it. *See Resolution Trust Corp.*, 918 F. Supp. at 1245-46. Accordingly, summary judgment is granted in favor of defendant Migliorino on Count I.

C. "Through a Pattern of Racketeering Activity": Proof of Predicate Acts

Having determined that there are genuine issues of material fact as to both the "conduct" and "enterprise" elements of plaintiffs' § 1962(c) RICO claim, against defendants Terry and OR, the court must now determine whether any issue exists as to their alleged conduct of the PLAN enterprise "through a

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[21] *See supra* at 9.

pattern of racketeering activity."[22]

"Racketeering activity" includes "any act or threat involving murder, kidnaping, arson . . . [or] extortion, . . . which is chargeable under State law and punishable by imprisonment for more than one year . . . ." 18 U.S.C. 1961(1)(A). In addition, the term covers "any act which is indictable under . . . section 650 (relating to theft from interstate shipment), . . . section 1951 (relating to interference with commerce, robbery, or extortion), . . . sections 2314 and 2315 (relating to interstate transportation of stolen property" of Title 18 of the United States Code. *Id.*

Plaintiffs have alleged that, through PLAN, defendants engaged in the following predicate acts of racketeering in violation of 18 U.S.C. § 1952 and the Hobbs Act, including acts or threats of: (1) extortion against clinic personnel, patients,

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[22]Section 1961(5) defines a "pattern of racketeering activity" as requiring "at least two acts of racketeering activity" within a ten-year period. *Id.* In their motion for summary judgment, defendants do not challenge plaintiffs ability to prove at trial the alleged predicate acts occurred within a ten-year period. Indeed, the allegations, if proved, will demonstrate that numerous predicate acts were committed by defendants over a ten-year period. For these reasons, the court will not address the "pattern" element in this motion.

Plaintiffs further claim that defendants are barred from challenging plaintiffs Travel Act and state law extortion allegations since they were not challenged in the summary judgment motions. Accordingly, the court will address defendants' motion as to the following predicate acts only: (1) Hobbs Act violations, (2) murder, (3) kidnap, (4) arson, and (5) theft of interstate property. *See, e.g., Washington Nat. Ins. Co. v. Hendricks*, 855 F. Supp. 1542, 1556-57 (W.D. Wis. 1994) (holding that plaintiff waived claim by failing to raise it in any of its briefs on summary judgment).

and suppliers of goods; (2) murder of clinic personnel, including doctors and their families; (3) kidnaping of clinic personnel, including doctors and their families; (4) arson of clinics that provide abortion services; (5) taking possession of interstate shipments of fetal remains with intent to convert the remains to their own uses; (6) obstruction of interstate commerce by extortion and/or threats to commit extortion and/or the commission or threat of physical violence to persons and property; and (7) travel in interstate commerce and the use of facilities in interstate commerce with intent to commit crimes of violence to further acts of extortion and/or arson, and/or to promote, manage, establish, or facilitate the promotion, management, establishment of extortion or arson. (Compl. ¶ 2). Defendants Terry and Operation Rescue argue that plaintiffs have no proof that they committed these predicate acts. Furthermore, they (Terry and Operation Rescue) contend that most of the alleged predicate acts predate their involvement in PLAN and that there is no evidence that they committed Hobbs Act extortion.

Each of the acts alleged above, standing alone, constitutes a predicate act under RICO. Thus, in order to prevail on their motion for summary judgment, defendants Terry and Operation Rescue must establish that there is no triable dispute regarding their commission of *any* of those acts. The court will evaluate the evidence proffered by plaintiffs as to each of the acts seriatim. First, however, a response to defendants' argument that the alleged predicate acts predate defendants' involvement in PLAN, and therefore cannot form the basis of plaintiffs' RICO claim, is in order.

In support of their argument, defendants rely on the theory

articulated in *Levine v. United States* that a individual cannot be held liable for the commission of substantive offenses by members of a conspiracy that predates that individual's involvement in the conspiracy. 383 U.S. 265, 266 (1996) (per curiam). However, as plaintiffs correctly observe, cases interpreting RICO have held that "a defendant who later joins an enterprise can be linked to the enterprise's previous predicate acts. Indeed, once a defendant becomes a co-conspirator in a RICO conspiracy, he is responsible for previous acts of the conspiracy." *United States v. Walters*, 711 F. Supp. 1435, 1448 (N.D. Ill. 1989) (citing *United States v. Neapolitan*, 791 F.2d 489, 505 (7th Cir. 1986)); *see also United States v. Lynch*, 699 F.2d 839, 842 n.2 (7th Cir. 1982) (RICO liability "includes actions which occur before the conspirator joins the conspiracy."). Moreover, *Levine* predates the enactment of RICO and thus, has little, if any, application to the instant case. Thus, defendants Terry and Operation Rescue may be held liable for all predicate acts committed by PLAN provided that the other elements of plaintiffs' RICO claim are met.

1. Hobbs Act Extortion

In its earlier adjudication of a motion to dismiss in this case, the court set forth the law governing Hobbs Act violations under RICO as follows:

> The Hobbs Act is violated by anyone who "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to so do, or commits or threatens physical violence to any person or property in furtherance of a PLAN or purpose to violate [this section] . . ." 18 U.S.C. § 1951(a). Extortion is defined as "the

obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

The elements of a Hobbs Act violation are: the defendants (1) induce their victims to part with property; (2) through the use of fear; (3) with an adverse effect on interstate commerce. *United States v. Local 560 of Int'l Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140, 106 S. Ct. 2247 (1986); *see* Harold Brown, *Civil RICO Practice: Causes of Action* 314 (1991); Carole Golinski, *In Protest of NOW v. Scheidler*, 46 Ala. L. Rev. 163, n. 134 and accompanying text (1994).

The definition of "property" under the Hobbs Act is expansive. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990). The Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . . ." *Stirone v. United States*, 361 U.S. 212, 215, 80 S. Ct. 270, 272 (1960). "In a broad sense, [property includes] any valuable right considered as a source or element of wealth, including 'a right to solicit business.'" *Town of West Hartford*, 915 F.2d at 101 (quoting *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir.1969), *cert. denied*, 397 U.S. 1021, 90 S. Ct. 1258, 1262, 25 L. Ed. 2d 530 (1970), and citing *Northeast Women's Center*, 868 F.2d at 1350). The property affected may be either tangible or intangible, such as the right to conduct business. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (citing *Local 560*, 780 F.2d 267,

281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986), for the proposition that the Hobbs Act extends to protect intangible as well as tangible property). The right to pursue a lawful business has likewise been protected. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928); *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969).

Indeed, the Seventh Circuit noted earlier in this case that "the Hobbs Act . . . does not require that the Defendant profit economically from the extortion." *NOW v. Scheidler*, 968 F.2d at 630 n. 17 (citing *Town of West Hartford*, 915 F.2d at 102; *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (defendant kidnaped and threatened to kill doctor unless he agreed to stop performing abortions violated Hobbs Act); *United States v. Starks*, 515 F.2d 112 (3d Cir.1975)).

Extortion under the Hobbs Act, thus, focuses on the loss to the victim. *United States v. Santoni*, 585 F.2d 667, 672 (4th Cir. 1978) ("the gravamen of the offense [of extortion under the Hobbs Act] is loss to the victim," quoting *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977)).

NOW v. Scheidler, 897 F. Supp. 1047, 1072-73 (N.D. Ill. 1995) (footnote omitted). Moreover, the Act's commerce nexus requires a showing of no more than a "minimal" obstruction, delay, or effect on interstate commerce. *See, e.g., United States v. Hocking*, 860 F.2d 769, 777 (7th Cir. 1988); *United States v. Anderson*, 809 F.2d 1281, 1286 (7th Cir 1987); *United States v. Conn*, 769 F.2d 420, 424 (7th Cir. 1985).

As proof of defendant Terry's Hobbs Act violation, plaintiffs

direct the court's attention to several documented efforts by defendant Terry to interfere with abortion clinics' ability to operate and women's constitutional right to obtain abortions from these facilities. For example, in 1986, Terry expanded his activist tactics to include blockades and clinics invasions. (Pls. TPO Ex. 4 at 753). Terry and members of his organization, Project Life, chained themselves to furniture, medical equipment, or other objects and conducted "'drive-in' sit-ins" which resulted in some pregnant women leaving the abortion facilities "without getting an abortion . . . ." (12(N) Pls. TPO ¶ 4; Pls. TPO Exs. 4 (Terry Depo. 1/11/91 at 569-70), 41). At the fourth annual PLAN Convention in 1987, seventy-nine PLAN activists orchestrated a "rescue" whereby they blocked access to an abortion clinic in Atlanta, Georgia closing the clinic for two and one half (2 1/2) hours. (12(N) Pls. TPO ¶ 4; Pls. Ex. 44). Most of the women seeking abortions at the facility during that time period were "turned away."[23] (Pls. TPO Ex. 44). In November 1987, Operation Rescue sponsored a protest project that entailed the blockading of the Cherry Hill Women's Center in Cherry Hill, New Jersey, where demonstrators were arrested. (12(N) Pls. TPO ¶ 12; Pls. TPO Exs. 5 at 1037; 9 (Burnett Depo. 3/5/96 at 152-53, 3/6/96 443-44), 12 at 199-200; 26 at 3, 28). Defendant Terry masterminded the idea of the blockade. (Pls. TPO Ex. 68).

In 1988, it became the essence of OR to construct blockades outside of abortion clinics. (Pls. Exs. 5 at 895; Pls. TPO Ex.

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[23]It is not clear whether these women were "turned away" as a result of defendants clearly protected activity of sidewalk counseling or as a result of the blockade. (See Pls. Ex. 44). This is a material factual dispute that cannot be determined on summary judgment.

46). Later, OR began to use cars to prevent women from getting abortions by using cars to block access to abortion facilities. (Pls. TPO Ex. 5 896-98). Attendees of the 1989 PLAN convention in Livonia, Michigan ended the convention in "rescues" which closed the Urgent Care clinic for a day and later performed a "rescue" a the Women's Care Center in Livonia at which eighty demonstrators were arrested. (Pls. Ex. 59 at 5-7). Moreover, plaintiffs have proffered uncontroverted evidence that defendants Terry and OR engaged in a series of "rescues" in Atlanta beginning on July 19, 1988, during which they, among other things, assaulted, tortiously harassed, and followed "sometimes for great distances patients their families and friends, employees medical practitioners and invitees of abortion facilities . . . ." (12(N) Pls. TPO ¶ 31 (quoting Pls. Ex. 80 at ¶ 14)). On February 11, 1989, defendant OR staged a rescue at the Women's Medical Center of Los Angeles, during which a patient was physically prevented from seeking post-operative medical care, pushed, shoved, assaulted, mobbed, and emotionally traumatized to the extent that she lost consciousness twice and was forced to attempt to seek care at another facility after experiencing excruciating abdominal pain. (12(N) Pls. TPO ¶ 31; Pls. TPO Ex. 81 at ¶¶ 1-2, 5-9). Operation Rescue members, including Foreman, spoke at a rally preceding the blockade and participated in this blockade and others organized by defendant Operation Rescue. (*See* 12(N) ¶ 31; Pls. TPO Ex. 82 at ¶¶ 2, 5-7, 9, 10, 16-20). In addition, plaintiffs have detailed Operation Rescue's participation in several "rescue missions" during which clinic personnel were harmed and threatened, and clinics were closed. (*See* 12(N) ¶

31).[24]

In light of this plethora of evidence, there is little doubt that plaintiffs have adequately demonstrated the existence of genuine issues as to defendants' affecting of intangible property--the right to pursue a lawful business--by the forced closing of clinics through the use of fear, and the resulting adverse effect on interstate commerce that can be inferred from those closings. Accordingly, plaintiffs' claims of Hobbs Act violations are preserved for trial.

2. Murder

In contrast to the overwhelming evidence of defendant Terry's and Operation Rescue's Hobbs Act violations, the record fails to support plaintiffs' allegation that any of the defendants individually or through PLAN committed the predicate act of murder. Indeed, plaintiffs are noticeably strained in their attempt to implicate the defendants in the attempted murder of Dr. George Tiller, and the murders of Dr. John Britton and James Barret.

Plaintiffs purport to establish a link between Rachelle Shannon ("Shannon"), who was convicted of the attempted murder of Tiller, and PLAN, defendant OR, and other organizations affiliated with PLAN. (*See* 12(N) Pls. TPO ¶ 26). However, plaintiffs' evidence merely shows that Shannon wore

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[24]Plaintiffs also cite evidence that defendant Terry's initial ideas for protest activity involved the destruction of property, throwing furniture out of clinic windows, barricading pro-life demonstrators inside of clinics. (*See* 12(N) Pls. TPO ¶ 7). However, there is no proof that these ideas were ever brought to fruition.

an Operation Rescue hat while participating in Operation Rescue sponsored rescues and was not "any more active than quite a number of other people at the time." (Pls. TPO Ex. 9 (Burnett Depo. 3/5/96 at 166-67); 21 (Shannon Depo. 3/18/96 at 71)). In fact, Shannon testified that she never signed up with Operation Rescue. (Pls. TPO Ex. 21 (Shannon Depo. 3/18/96 at 70)). There is no evidence that Operation Rescue planned, assisted in, or facilitated Shannon's felonious acts.

Plaintiffs further allege that Paul Hill, who was convicted of the murders of Dr. John Britton and his volunteer escort James Barret at the Pensacola Ladies' Center Clinic on July 29, 1994, conspired with defendants and attended PLAN events. (*See* 12(N) Pls. TPO ¶ 26). The evidence upon which plaintiffs rely demonstrates, however, that PLAN leaders and core members, including defendant Scheidler and other named defendants, refused to sign a petition supporting a theory of "justifiable homicide" with respect to pro-life activism and attempted to dissuade Hill from subscribing to that theory.[25] (12(N) ¶ 26; Pls. Exs. 10 (Scheidler Depo. 1/7/97 at 796-803), 22 (Paul Hill Depo. 12/8/95 at 17)). Not only does this evidence fail to support plaintiffs' theory, but it lends credence to the contrary proposition that there was no conspiracy between either Shannon or Hill and the defendants. Accordingly, summary judgment is granted in favor of the defendants on plaintiffs' § 1962(c) RICO claim to the extent that it is based on the predicate act of murder.

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[25]The evidence shows that Burnett later signed a petition in support of the "justifiable homicide" defense with respect to the criminal prosecution of Paul Hill. (Pls. TPO Ex. 91). This petition does not contain the signatures of any other alleged leaders of PLAN or named defendants. (*See id.*).

3. Kidnaping & Arson

In proving defendants' commission of the predicate acts of kidnaping and arson, plaintiffs try again to implicate defendants through the acts of third parties who have no established connection to defendants or PLAN that would cause this court to impute the acts of those third parties to the defendants or PLAN. For example, plaintiffs cite to Shannon's deposition testimony regarding her various acts of arson and attempted robbery without demonstrating that defendants were in any way involved in these acts. (12(N) Pls. TPO ¶ 27; Pls. TPO Ex. 21 (Shannon Depo. 3/18/96 at 112, 126, 136, 141). In addition, plaintiffs show that Scheidler had at least one conversation with Don Anderson, who had been convicted of kidnaping Dr. Devallos, an abortion provider, and openly supported Anderson. (*See* 12(N) Pls. TPO ¶ 27; Pls. Exs. 52, 77-78). However, nothing in the record connects the actors or their acts to defendants or PLAN. Accordingly, summary judgment is granted in favor of the defendants on plaintiffs' § 1962(c) RICO claim to the extent that it is based on the predicate acts of kidnaping and arson.

4. Taking Possession of Interstate Shipments of Fetal Remains

Plaintiffs allege that defendant Andrew Scholberg, an official sponsor of OR, (Pls. TPO Ex. 30), informed defendant Migliorino that Vital-Med Services was in possession of fetal remains. (12(N) Pls. TPO ¶ 29; Pls. TPO Ex. 18 (Migliorino Depo. 7/23/90 at 198). Migliorino then made plans with others to retrieve the remains and, over the course of ten (10) months,

made approximately twenty (20) trips with Murphy and others to Vital-Med at night to steal more than 4,000 fetal remains. (12(N) Pls. TPO ¶ 29; Pls. Exs. 15 (Murphy Depo. 12/28/88 at 216, 242-43), 18 (Migliorino Depo. 7/23/90 at 157, 195, 211-13), 23 (Pabich Depo. 7/11/96 at 73-76), 79 at ¶ 37). As a result of these thefts, Vital-Med canceled its contract with several clinics, including DWHO, Summit, and their affiliates. (12(N) Pls. TPO ¶ 27; Pls. TPO Ex. 79 at ¶ 37).

However, in light of this court's resolution that Migliorino's alleged affiliation with defendants Operation Rescue and PLAN was not sufficient to subject Migliorino to liability, these allegations are similarly insufficient to create a genuine issue as to defendant Terry's and Operation Rescue's commission of the theft of fetal remains. Defendants motion for summary judgment on the ground that plaintiffs cannot prove this predicate act is therefore granted.

5. Obstruction of Interstate Commerce

Plaintiffs claim that defendants obstructed interstate commerce by blockading abortion clinic doors, obstructing doctors' and patients' ingress to and egress from abortion clinics, and threatening, harassing, and assaulting abortion clinic personnel and clients. (12(N) Pls. TPO ¶¶ 12, 23, 31). Plaintiffs further allege that patients and clinic personnel were placed in reasonable fear by these incidents, (*Id.* ¶¶ 7, 31, 44, 49), especially in light of an increasingly hostile antiabortion climate. (*Id.* ¶¶ 40-49). These allegations coupled with the documented evidence of defendants efforts obstruct ingress to

and egress from abortion clinics[26] and to commit the theft of fetal remains which resulted in the termination of various contractual agreements with national clientele,[27] are sufficient to withstand summary judgment.

II. Count II: RICO Claim under Section 1962(d)

Section 1962(d) of RICO makes it unlawful "for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)." 18 U.S.C. § 1962(d). Here, plaintiffs allege that defendants conspired to commit a section 1962(c) violation. As with any conspiracy charge, in order to prevail on their claim, plaintiffs must proffer evidence of an agreement between and among the defendants. *See United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir.1986) ("[A] conspiracy to violate RICO should not require anything beyond that required for a conspiracy to violate any other federal crime.").

Agreement is the cornerstone of any RICO conspiracy claim. *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 960 (7th Cir. 1996). Indeed, it is the agreement to violate RICO's substantive provisions, not the actual violations themselves, that imposes liability under § 1962(d). *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344, 348 (7th Cir. 1992). The Seventh Circuit has observed:

> From a conceptual standpoint a conspiracy to violate RICO can be analyzed as composed of two agreements. . . ."

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[26] *See supra* Part I.C.1.

[27] *See supra* Part I.C.4.

> *Neapolitan*, 791 F.2d at 499. The first is "an agreement to conduct or participate in the affairs of an enterprise [or to acquire or maintain any interest in or control of any enterprise] through a pattern of racketeering activity." *Id.* at 498. The second is "an agreement to the commission of at least two predicate acts." *Id.* at 499. If either aspect of the agreement is lacking then there is insufficient evidence that the defendant embraced the objective of the alleged conspiracy. Finally, a "RICO conspiracy, like all conspiracies, does not require direct evidence of agreement; an agreement can be inferred from the circumstances." *Id.* at 501 (citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L. Ed. 680 (1942)).

Gagan, 77 F.3d at 961.

Accordingly, to withstand a motion for summary judgment, plaintiffs must show that a genuine issue exists as to whether defendants agreed to conduct (or participate in the conduct of) PLAN through a pattern of racketeering activity, and that defendants further agreed that someone would commit at least two predicate acts to accomplish those goals. Plaintiffs are not required to show, however, that defendants committed the predicate acts themselves, *Schiffels*, 978 F.2d at 348, or that defendants agreed to commit the predicate acts themselves or even participate in their commission. *Neapolitan*, 791 F.2d at 498 (breadth of RICO conspiracy liability extends even to "those persons who while intimately involved in the conspiracy, neither agreed to personally commit nor actually participated in the commission of the predicate" offenses); *see also United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) (RICO conspiracy law, like traditional conspiracy law, requires only

that each defendant agree to join the conspiracy, not that he agree to commit each of the acts that would achieve the conspiracy's purpose.); *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (personal agreement to commit two predicate acts is not a prerequisite to RICO conspiracy liability). Rather, plaintiffs need only demonstrate that defendants agreed that the acts would be committed on behalf of the conspiracy. *United States v. Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993); *United States v. Campione*, 942 F.2d 429, 437 (7th Cir. 1991); *United States v. Glecier*, 923 F.2d 496, 500 (7th Cir.), *cert. denied*, 502 U.S. 810, 112 S. Ct. 54 (1991).

Plaintiffs show that at the 1986 PLAN convention, PLAN leaders decided that their "rescue missions" would entail sit-ins and blockades. (12(N) Pls. TPO ¶ 23; Pls. TPO Ex. 2 (Terry Depo. 1/9/91 at 90-91). In or about March 1987, Terry and Scheidler met in New York to plan and agree to a clinic blockading strategy. (12(N) Pls. TPO ¶ 23; Pls. TPO Ex. 68). Furthermore, at or around the time of the 1987 PLAN Convention, all PLAN committee members agreed to support the Operation Rescue project. (12(M) Defs. TPO ¶ 7; 8 241-42, 12 at 169-72). During the convention, Terry and other PLAN leaders and attendees, including defendants Scheidler, Murphy, and Scholberg, participated in a blockade of the Northside Women's Health Center in Chamblee, Georgia. (12(N) Pls. TPO ¶ 23; Pls. TPO Ex. 3 (Terry Depo. 1/10/91 at 395-96, 10 (Scheidler Depo. 9/24/87 at 301-05), 15 (Murphy Depo. 12/28/88 at 100-01), 72). In addition, PLAN Leadership Committee met and planned, among other things, city to city national days of rescue. (12(N) Pls. TPO ¶ 23; Pls. Ex. 9 (Burnett Depo. 3/5/96 at 168-69), 10 (Scheidler Depo. 9/24/87 at 240-47); 65).

In 1987, Terry and other members of the PLAN advisory board unanimously agreed to change the location of an OR clinic blockade from St. Louis to Philadelphia. (12(N) ¶ 23; Pls. Exs. 6 (Terry Depo. 8/15/96 at 1180-82; 26). On or about August 20, 1987, the PLAN Advisory Board agreed to forcibly blockade abortion clinics in New York City from on or about May 2 though May 6, 1988, during which time 503 persons arrested in connection with that event including defendants Terry and Scheidler. (12(N) Pls. TPO ¶ 23; Pls. Ex. 9 (Burnett Depo. 3/6/96 at 316), 18 (Migliorino-Miller Depo. 8/11/89 at 59-60), 26, 73).

Taken as a whole, this evidence is sufficient to support an inference that defendants Terry and Operation Rescue agreed between and among themselves to conduct (or participate in the conduct of) PLAN's affairs through a pattern of racketeering activity, and further agreed to the commission of at least two predicate acts on behalf of the conspiracy. Indeed, evidence that defendants planned blockades and other protest activities that resulted in violations of § 1962(c) is more than adequate to preserve this claim for trial. Accordingly, defendants motion for summary judgment on plaintiffs' claim under § 1962(d) is denied. As for defendant Migliorino, there is no evidence of agreement other than that proffered to establish her participation at PLAN which was rejected by the court. Moreover, plaintiffs have cited no evidence of agreement by defendant Project Life to conduct PLAN's affairs in a pattern of racketeering activity. Accordingly, summary judgment is granted in favor of defendants Migliorino and Project Life on plaintiffs' RICO conspiracy claim.

III. Count III: Tortious Interference with Prospective

Economic Advantage

In Count III of their complaint, plaintiffs DWHO and Summit bring a state law claim for tortious interference with prospective economic advantage against several named defendants, including defendant Migliorino, on behalf of themselves, and not on behalf of any class.[28] In order to maintain an action for tortious interference with prospective economic advantage in Illinois,[29] plaintiffs DWHO and Summit must establish four elements: (1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's

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[28]The other defendants against whom this charge is alleged are defendants Scheidler, Scholberg, Murphy, Migliorino, and PLAL. (Compl. P 95). Defendants Terry, Operation Rescue, and Project Life are not named in this count. (*See id.*).

[29]Both parties cite only federal law in argument regarding the claim for intentional interference with a prospective business relationship (or prospective economic advantage) and neither party addresses the choice-of-law issue with respect this count. When addressing a state law claim, a federal district court in Illinois follows Illinois law, including its choice of law provisions. *See International Adm'rs, Inc. v. Life Ins. Co. of N. Am.*, 753 F.2d 1373, 1376 n. 4 (7th Cir. 1985). For tort claims, where the laws of two states are essentially the same, courts apply the law of the forum state. *See Railway Express Agency, Inc. v. Super Scale Models, Ltd.*, 934 F.2d 135, 139 (7th Cir. 1991) (applying Wisconsin choice of law rules for tortious interference claim because Wisconsin and New York law recognized essentially the same elements for the claim). "Conflicts rules are appealed to only when a difference in law will make a difference to the outcome." *International Adm'rs*, 753 F.2d at 1376 n. 4, and this court has discerned no material difference between Wisconsin and Illinois law regarding the tort of intentional interference with prospective economic advantage. Thus, it is appropriate for this court to apply Illinois law to Count III. *See International Adm'rs*, 753 F.2d at 1378 n. 5.

knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 217 Ill. Dec. 720, 667 N.E.2d 1296 (Ill. 1996) (citations omitted); *see also Delloma v. Consolidation Coal Co.*, 996 F.2d 168, 170-71 (7th Cir. 1993) (citing *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 511, 154 Ill. Dec. 649, 657, 568 N.E.2d 870, 878 (1991)).

Plaintiffs Summit and DWHO allege that they, through their management company, National Women's Health Organization, Inc., had a contract with former defendant Vital-Med to provide abortion-related and other pathology services to the clinics. Plaintiffs further maintain that, during 1988, defendant Migliorino schemed to steal fetal specimens and send them from Chicago, Illinois to Fargo, North Dakota; Fort Wayne, Indiana; Raleigh, North Carolina; Milwaukee, Wisconsin; and Wilmington, North Carolina. Defendant Migliorino allegedly knew of the contract with Vital-Med and intentionally, maliciously, and without justification induced Vital-Med to terminate its business with plaintiffs DWHO and Summit through these acts. Moreover, plaintiffs claim that Vital-Med's subsequent breach of contract with plaintiffs DWHO and Summit was a result of defendant Migliorino's tortious interference with plaintiffs' ongoing business relationship with Vital-Med.

Defendant Migliorino contends that she is entitled to summary judgment on this count because there is no evidence that her actions were a substantial factor in, and thus the proximate cause of, the termination of the contractual

relationship. Migliorino submits that the primary reason why Vital-Med terminated its relationship with plaintiffs was because of a lack of economic profit in handling the fetal remains. The evidence cited by the parties does not clearly support either parties' version of events.

As is plain from this court's earlier discussion,[30] defendant Migliorino played a significant role in the removal and interstate shipment of fetal remains. However, this showing is not enough to survive summary judgement on this claim. Damages for tortious interference with prospective business advantage must be proximately caused. *E.g.*, *McIntosh v. Magna Systems, Inc.*, 539 F. Supp. 1185, 1192 (N.D. Ill. 1982) (damages must result from the disruption of plaintiff's legitimate expectancy).

In its answer to interrogatories, Vital-Med admitted that "among other reasons, the theft of remains and subsequent public disclosure that the specimens were stolen from [Vital-Med] contributed to the cancellation of the oral, at-will contract between Vital-Med and DWHO, SWHO, and four other affiliated clinics." (Pls. Migl. Ex. 18 at ¶ 37). Defendant Migliorino attempts to counter this evidence with testimony from Vital-Med's vice president that "even after the initial price increase, [he and Vital-Med's president] found that [providing services to the plaintiff laboratories] still was not profitable even at that new price." (12(N) Migl. at ¶ 31; Evidentiary Materials in Support of Motion for Summary Judgment by Defendant Monica Migliorino (Miller) ("Def. Migl. Exs") 11 at 103). Further, Vital-Med's President testified that, because the

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[30] *See supra* Part I.C.4.

specimens were not profitable, he made the decision to discontinue the service. (12(N) Migl. at ¶ 31; Def. Migl. Exs. 10 at 151). Vital-Med's president also admitted, however, that the adverse publicity engendered by the thefts was "a concern" to the extent that it affected the laboratory's operation or marketing. (Def. Migl. Exs. 10 at 152).

The court finds that the foregoing statements do not create a genuine issue as to whether defendant Migliorino's acts proximately caused Vital-Med to breach its agreements with plaintiffs DWHO and Summit. Because under Illinois law, "proximate cause can only be established when there is a *reasonable certainty* that the defendant's acts caused the injury" *Schultz v. Hennessy Industries*, 222 Ill. App. 3d 532, 165 Ill. Dec. 56, 62, 584 N.E.2d 235, 241 (1991) (emphasis added), it is incumbent on plaintiffs, as the party with the burden of proof, to come forward with convincing affirmative evidence that defendant Migliorino's acts proximately caused the breach in order to survive summary judgment. Plaintiffs have not met this burden. Accordingly, summary judgment on Count III is granted.[31]

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[31]Moreover, the tort of intentional interference with prospective economic advantage "is concerned only with intentional interference with prospective contractual relations [that are] not yet reduced to contract." *Smith v. SRDS, Inc.*, No. 96 C 858, 1997 WL 11014, *2 (N.D. Ill. Jan.7, 1997) (citing *Delphi Industries, Inc. v. Stroh Brewery Co.*, 945 F.2d 215, 218 (7th Cir. 1991)). The tort "cannot be maintained upon the breach of an existing contract." *Delphi Industries*, 945 F.2d at 218 (citing *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 154 Ill. Dec. 649, 568 N.E.2d 870, 878 (Ill. 1991). The parties have acknowledged that Vital-Med performed certain services, i.e. the processing of fetal remains, for plaintiffs in the context of a business relationship. Plaintiffs may have therefore incorrectly brought

(continued...)

III. Count IV: Tortious Interference with Existing Business Relationship

Plaintiff Summit brings Count IV for tortious interference with an existing business relationship against defendant Migliorino only, on its own behalf, and not on behalf of any class. Summit maintains that Migliorino knew of Summit's lease with Jefferson Associates, Ltd. ("Jefferson") for certain premises in the Jefferson Building in Milwaukee, Wisconsin, and sent a letter "threatening controversy and conflict with antiabortion activists if Summit were allowed to enjoy the benefits of this lease." (Compl. ¶ 105).

Under Wisconsin[32] law, an action for tortious interference

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[31](...continued)
this claim where a contractual relationship already exists between the plaintiff laboratories and Vital-Med.

[32]As stated earlier, when addressing a state law claim, a federal district court in Illinois follows Illinois law, including its choice of law provisions. *See International Adm'rs, Inc. v. Life Ins. Co. of N. Am.*, 753 F.2d 1373, 1376 n. 4 (7th Cir. 1985). Illinois employs the "most significant relationship" test as set out in the Restatement 2d of Conflicts. *Id.* at 1376-77 n. 4. Under that test, the court must weigh various contacts to determine which state has the most significant relationship to the transaction at issue. *Id.*

Here, defendant Migliorino assumes the applicability of the laws of Wisconsin. All of the factors relevant to the specific conduct at issue--the letter writing campaign and Migliorino's visit with Lee--point toward Wisconsin. Accordingly, Wisconsin law governs. *See, e.g., Firkin v. U.S. Polychemical Corp.*, 835 F. Supp. 1048, 1050 (N.D. Ill. 1993) (applying Illinois choice of law rules, when injury occurred in Illinois and plaintiff was domiciled in Illinois, defendant's incorporation in New York did not (continued...)

with a contractual relationship has five elements: (1) the plaintiff must have had a contractual relationship with a third party; (2) the defendant must have interfered with that relationship; (3) the interference by the defendant must have been intentional; (4) there must be a causal connection between the interference and damages; and (5) the defendant must not have been justified or privileged to interfere. *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir. 1994) (applying Wisconsin law and citing *Bersch & Co. v. Dairyland Greyhound Park, Inc.*, No. 92 C 2288, 1994 WL 185996 at *9, (Wis. App. 1994), *review denied*, 525 N.W.2d 732 (Wis. 1994)); *see also Cudd v. Crownhart*, 122 Wis.2d 656, 659-60, 364 N.W.2d 158, 160 (Ct. App. 1985); *Lorenz v. Dreske*, 62 Wis.2d 273, 214 N.W.2d 753 (1974). Defendant Migliorino argues that the Court should grant summary judgment on this count on the grounds that (1) her actions are protected under the First Amendment, (2) her actions were not tortious because there was no existing contract, and (3) she did not have knowledge of the alleged contract. Recognizing the Court's prudential directive against unnecessary adjudication of constitutional issues, *see, e.g., Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47, 56 S. Ct. 466, 482-83 (1936) (Brandeis, J., concurring), the court will first examine the substance of plaintiff Summit's claim. Only if the claim survives summary judgment will this court consider defendant Migliorino's affirmative defense under the First Amendment.

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[32](...continued)
overcome the presumption that the law of the place of injury applies); *Rosett v. Schatzman*, 157 Ill. App. 3d 939, 943, 510 N.E.2d 968, 971 (1987) (fact that plaintiff and defendant both resided in Illinois did not justify application of Illinois law where defendant's conduct and plaintiff's injury both occurred in Florida).

A. Genuine Issue of Material Fact as to Plaintiff's Claim

In order to satisfy the first element of its claim, plaintiff Summit must allege "tortious interference with a contract rather than a prospective business advantage." *Dresser Indus., Inc. v. Pyrrhus AG*, 936 F.2d 921, 934 (7th Cir. 1991). Accordingly, plaintiff Summit bears the burden of establishing the existence of a valid and enforceable contract. Here, defendant Migliorino argues that a valid lease agreement did not exist between Summit and Jefferson because the lease agreement was subject to final approval by the mortgage lender. However, Defendant Migliorino cites no authority for the proposition that a lease agreement subject to the approval of a mortgage lender has no legal force. To the contrary, traditional principles of contract formation suggest that a valid agreement between Jefferson and Summit was in place at the commencement of Migliorino's allegedly tortious conduct. This agreement was immediately binding, with performance due upon the occurrence of a specified future event--obtaining lender approval.

A more important but related argument of defendant Migliorino is that she had no contact with Washington National, the mortgage lender whom she alleges ultimately declined to approve the lease agreement. Lee has testified however, that he, not Washington National, rejected the lease. (Pls. Migl. Ex. 48). He further stated, "I decided not to allow Summit into that building because I was afraid that harm would come to me, my building and my other tenants from Migliorino and others associated with her if I let Summit move in." (*Id.*). This contested issue raises a genuine issue of material fact regarding proximate cause. There is no evidence that

Migliorino tortiously induced Washington National while there is abundant evidence of her efforts to dissuade Lee from honoring the lease agreement. Thus, it becomes material who effected breach in order to determine whether the breach was a result of Migliorino's acts. This issue being contested, summary judgment is inappropriate.

As to Migliorino's knowledge of the existence of the contract, there is conflicting testimony as to whether Migliorino had actual notice of the contract at the commencement of her allegedly tortious acts. For example, Migliorino claims that she was informed that no lease had been finalized. (12(M) Migl. ¶ 32). The evidence shows that Migliorino contacted and subsequently met with Joel Lee ("Lee"), a lessor at Jefferson, to persuade him not to lease the subject premises to plaintiff Summit. (12(M) Migl. ¶ 32; 12(N) Migl. ¶ 32). Migliorino admits that her intent was to induce landlords to terminate their leases with those tenants engaged in the provision of abortion services. (Pls. Migl. Ex. 3 (Migl. Depo. 7/23/90) at 59-60). At the time of his meeting with Migliorino, Lee had already decided to rent space to and signed a lease with Summit. (12(N) ¶ 32; Pls. Migl. Ex. 48, 55). Lee testifies by way of affidavit that he told Migliorino that the lease with Summit had already been executed but lender approval of the lease had not yet been secured. (12(N) ¶ 32; Pls. Migl. Ex. 48).

In light of the foregoing, the court finds that there is a genuine dispute regarding Migliorino's knowledge of the existence of the lease agreement.[33] Thus, Migliorino's

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[33]It should be noted, however, that this dispute stems from Migliorino's (continued...)

substantive challenges to plaintiff Summit's ability to prove its claim are insufficient to compel summary judgment.

B. First Amendment Affirmative Defense

Defendant Migliorino's first argument, however, raises more viable concerns not unanticipated by this court. Indeed, the Seventh Circuit has directed this court to address, "if necessary, . . . which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution."[34] *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. Migliorino contends that her acts of campaigning against Summit's tenancy at the Jefferson premises is protected First Amendment activity. The evidence shows that Migliorino engaged in, and enlisted others to engage in, an extensive letter-writing campaign through which Lee was contacted by tenants and antiabortion activists regarding their opposition to Summit's pending tenancy. (*See* 12(M) Migl. ¶¶ 32, 35; Pls. Migl. Exs. ¶¶ 32, 35). The letters threatened disturbances at the

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[33](...continued)
testimony that she was "informed" that a binding agreement did not exist, not from her subjective interpretation of the circumstances. Indeed, the court may not rely Migliorino's subjective appreciation of the facts. *See, e.g. Boll v. Hyatt Corp.*, 243 Ill. App. 3d 1005, 1009, 614 N.E.2d 71, 74, 184 Ill. Dec. 870, 873 (1st Dist. 1993).

[34]This directive follows Justice Souter's comment in concurrence: "Even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *NOW v. Scheidler*, at 510 U.S. ___, 114 S. Ct. at 807 (Souter, J. concurring).

premises and more ambiguous threats of harm.[35] In addition,

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[35]The following are excerpts from some of the letters received by Lee:

"I would think twice before you rent it."

"I . . . urge you to break contract with this organization . . . . Otherwise the pro-life community will have no choice but to boycott your management firm as well as protest, picket, and hold vigils, sit-ins and rescue operations at the site."

"Be prepared for continual protests outside your building, constant media coverage of those, and the attention of all who witness the prolife-rallies. I am also aware of several people who are willing to engage in illegal activities . . . ."

"Please rip up the contract or rental agreement . . . . Of course if you lease the building there will be no rest from us . . . ."

"Clean up your act and tell Summit that you won't let them murder babies in your building or my friends and I will make things look very bad for you."

"Prolifers will frequently engage in protests at the Jefferson building if Summit moves in as planned. I personally will organize protests at the building and engage in civil disobedience . . . ."

" . . . I will do whatever it takes . . . . I have many friends who are committed to saving the lives of those babies. We will make our presence known. Don't let the baby butchers into your building, or you will find that business has taken a turn for the worse."

"I guarantee that there will be much bad publicity for you. I, and many others, will picket and protest in front of your building, and some of them are willing to commit acts of civil disobedience . . . ."

(continued...)

Migliorino personally visited Lee to persuade him not to rent to Summit. (*Id.*).

The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the government for a redress of grievance.

U.S. Const. amend. I. Abridgment of such freedoms is sanctioned only where, in the instance of speech, the speech is characterized as fighting words. *See Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1965). Indeed, under *Brandenburg*, the only way that a state may regulate speech is if the speech calls for immediate illegal acts which are likely to occur following the speech.[36] *Id.*

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[35](...continued)
"Even though the rental agreement has already been signed, I hope that this letter will serve to stop Summit from establishing on your premises."

"To avoid future problems, do not lease building space to Summit . . . . If this abortion clinic opens I'm going to be picketing with as many people as I can find, frequently !!!"

Pls. Migl. Ex. 48. (emphasis in original).

[36]In *Brandenberg*, the Supreme Court struck down an Ohio law which was not "directed to inciting or producing *imminent* lawless action [emphasis added]" and "likely to produce such action" yet nonetheless prohibited speech. *Brandenberg*, 395 U.S. at 447.

In its earlier opinion, this court discussed the pertinent cases governing defendants' First Amendment defense:

> In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, the Court reversed a judgment which awarded damages caused by a seven-year boycott organized by the plaintiff NAACP and its members, which was imposed against defendants, who were white-owned businesses, to achieve integration. *Claiborne Hardware Co.* is factually similar to this case because both cases dealt with political protest mixed with violence. The *Claiborne Hardware Co.* boycott consisted of picketing and "disciplining" African Americans who continued to patronize white-owned stores. The "discipline" consisted of members of the NAACP, called "Black Hats" or "Deacons," who stood outside white-owned stores and identified African Americans who transacted business with them. The Deacons then published the names of the "offenders" both orally at the NAACP meetings, and in a paper called the "Black Times." The lower court also observed that four incidents which clearly involved violence occurred because the victims ignored the boycott, and noted six others that showed an "unlawful form of discipline was applied to certain boycott violators." *Claiborne*, 459 U.S. at 905, 102 S. Ct. at 3421. . . . The Court concluded that the "coercion, intimidation, and threats" were "part of the boycott activity" and were protected by the First Amendment. *Claiborne*, 459 U.S. at 906, 102 S. Ct. at 3423. However, and importantly, the Court expressly distinguished *Milk Wagon Drivers Union of Chicago, Local 753 et al. v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, *reh'g denied*, 312 U.S. 715, 61 S. Ct. 803 (1941). In *Milk Wagon Drivers* the Court upheld an

injunction that prohibited both violent and nonviolent picketing and protesting activity because of the violent environment and conduct surrounding the activity. The *Claiborne* court distinguished *Milk Wagon Drivers* by stating, "in this case [*Claiborne*] the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of all business losses sustained over a 7-year span." *Claiborne*, 459 U.S. at 924, 102 S. Ct. at 3431. Thus, the Court gave great importance to the context of the violence in which the speech/nonspeech activities rested. Where there is a context of violence over the entire time span of the suit, and that violence is of a serious nature, such as was the case in *Milk Wagon Drivers* (in which at least fifty instances of window-smashing, explosive bombings, stench bombs, destruction of trucks and stores, serious injury to drivers and storekeepers, arson, threats and the like), the Court gives greater weight to the protection of citizens and property and less to free speech concerns. The protest speech in *Milk Wagon Drivers* occurred by both words and violent actions. Indeed, that court constructed the question as "whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are *enmeshed* with contemporaneously violent conduct which is concededly outlawed." *Milk Wagon Drivers*, 312 U.S. at 292, 61 S. Ct. at 554. The violence which was used to protest the method of milk distribution was plainly not protected by the First Amendment, although the picketing plainly was. However, where the protest activity is relatively peaceful, with only minor breaches of the peace, it is more likely that the Court will guard free speech privileges of the protesters with greater vigilance. More importantly, when peaceful and

violent activity are "enmeshed," that fact counsels in favor of regulation of the entire range of action.

NOW v. Scheidler, 897 F. Supp. 1047, 1085 (N.D. Ill. 1995).

At this stage in the litigation, the court's analysis of the First Amendment issue is an even closer call. The acts that seemingly would have rendered otherwise protected speech enjoinable under both *Clairborn* and *Milk Wagon Drivers* such as murder, arson, and kidnaping, have been eliminated from the scope of this lawsuit.[37] Moreover, with respect to defendant Migliorino in particular, there are no acts of violence as to which her conduct or participation is in question.[38] Thus, in order to adjudicate properly her motion for summary judgment on the tortious interference claim, this court must determine whether otherwise protected speech may be proscribed by business tort laws.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court addressed this issue in the antitrust context. 365 U.S. 127, 81 S. Ct. 523 (1961) ("*Noerr*"). In that case, long-distance trucking companies and others brought an action against twenty-four major railroads and

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[37]*See supra* Parts I.C.2&3.

[38]Indeed, Migliorino's conduct is no longer being challenged as a threat or an extortionate tactic. Rather, Migliorino seeks to invoke the protection of the First Amendment to bar plaintiff Summit's ability to recover any damages that resulted from her interference with plaintiff Summit relationship with Jefferson.

others for violation of the Sherman Anti-Trust Act.[39] *Id.* The railroads filed a counterclaim charging a violation of the Act by the trucking companies. *Id.* at 527, 81 S. Ct. at 132. The basis of the plaintiffs' claim lay in the defendants' publicity campaign directed toward obtaining governmental action adverse to the interests of the trucking companies. *Id.* at 526, 81 S. Ct. at 130. Specifically, the defendants "conducted a publicity campaign designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations." *Id.* at 131, 81 S. Ct. at 526. The defendants denied that their campaign was prompted "either by a desire to destroy the trucking business as a competitor or to interfere with the relationships between the truckers and their customers. Rather, they insisted, the campaign was conducted in furtherance of their rights 'to inform the public and the legislatures of the several states of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the law limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the cost of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create.'" *Id.* Defendants argued that their

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[39]The Act reads in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1, 15 U.S.C.A. § 1. It further states, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor." 15 U.S.C.A. § 2.

campaign did not violate the Sherman Act, presumably because the Act "could not properly be interpreted to apply either to restraints of trade or monopolization that result from the passage or enforcement of laws or to efforts of individuals to bring about the passage or enforcement of laws."[40] *Id.* at 131-32, 81 S. Ct. at 526.

The Court held that such campaigning was not illegal even though it may have been affected by an anticompetitive purpose and that the use of a "third-party technique" by the railroads in their publicity campaign did not violate Sherman Anti-Trust Act. *Id.* The Court based its holding not only on the principle that a restraint on trade or monopolization that is the result of valid governmental action, as opposed to private action, does not violate the Act, *id.* at 135-36, 81 S. Ct. 528 (citing *Standard Oil Co., of New Jersey v. United States*, 221 U.S. 1, 51-62, 31 S. Ct. 502, 512-516 (1911)), but also on that fact that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of

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[40]Plaintiffs prayer for injunctive relief asked that the defendants "be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any private or public organizations to propagate the arguments of the railroads against the truckers or their business, and from doing any other act or thing to further the objects and purposes of the conspiracy." 365 U.S. 127, 131, 81 S. Ct. 523, 526.

'combination(s) in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act . . . ." *Id.* at 136, 81 S. Ct. at 529. Moreover, the Court held that even if the intent of the railroad was to eliminate competition from the truckers, the railroads' otherwise lawful conduct could not be rendered unlawful. *Id.* at 138-39, 81 S. Ct. at 530. The Court further noted that the Sherman Act was enacted to proscribe trade restraint, not the political activity in which the railroads engaged. *Id.* at 140, 81 S. Ct. at 531.

The contours of these holdings were further defined by the Court in *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585 (1965) ("*Pennington*"). *Pennington* involved an antitrust suit by small coal mine operators against the coal miners' union on the basis of an industry-wide collective bargaining agreement whereby the employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay for the purpose of forcing some employers out of business. *Id.* The Court held that the trial court improperly instructed the jury that if it [the jury] determined the requisite anticompetitive purpose to be present, it was free to find an illegal conspiracy. *Id.* at 670, 85 S. Ct. 1593. Applying *Noerr*, the Court explained that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 669, 85 S. Ct. at 1593.

Together, these cases (*Noerr* and *Pennington*) set forth what is now known as the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine exempts from the antitrust laws certain political activity that produces anticompetitive effects. This

doctrine has useful application to the case at bar. Indeed, in a case much like this one, the Eight Circuit applied the *Noerr-Pennington* doctrine to determine the legality of certain political speech that effected a restraint on trade within the context of the First Amendment. *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980). Ironically, the defendant in that case is NOW.

The State of Missouri sued NOW for injunctive relief on the ground that NOW's campaign for a convention boycott of the states which had not ratified the equal rights amendment constituted combination and conspiracy in restraint of trade, violated state antitrust law, and constituted tortious intentional infliction of economic harm without legal justification. *Id.* The Court of Appeals for the Eighth Circuit held that defendant's efforts to influence state legislatures were beyond the scope and intent of the Sherman Act or the Missouri antitrust law, and that the defendant's activities were privileged on the basis of the First Amendment right to petition. *Id.* The court rejected Missouri's argument that the boycott was beyond the purview of the *Noerr-Pennington* doctrine. *Id.* at 1315-16. The court reasoned,

> [T]he crux of the issue is that NOW was politically motivated to use a boycott to influence ratification of the ERA. In our case, as in *Noerr*, the publicity campaign was not a mere sham to cover up an-attempt to interfere with the business relationship of a competitor. . . . NOW's concerted activities and publicity campaign were initiated to show that in not ratifying the ERA, Missouri was denying rights to women, and in order to show displeasure with Missouri and to show support for the ERA, organizations were urged by

> NOW not to hold their conventions in Missouri. The ultimate goal was to have the ERA ratified and the hope was that by boycotting the state for as long as the ERA remained unratified in that state, it would result in a favorable legislative vote.
>
> * * *
>
> 'It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.'

Id. at 1314-15 (citations omitted) (quoting *Noerr*, at 143-44, 81 S. Ct. at 533).

Taking the Eighth Circuit's analysis one step further, it follows that nonviolent campaigns that are (1) politically motivated, and (2) waged against an entity by a commercial noncompetitor are protected under the First Amendment. Indeed, in addition to the policy concerns articulated by both the Court and the Eighth Circuit of not hampering attempts to effect legislative change, an important aspect of each court's decision was the nature of the competitive relationship between the actor and the party being harmed. Even where anticompetitive interests motivated the political activity in question, the Court acknowledged that where the immediate result was to effect legislative change, and not gain a commercial benefit, such activity was constitutionally

protected. *See Noerr*, at 127, 81 S. Ct. at 523; *Pennington*, at 657, 85 S. Ct. at 1585. Likewise, defendant Migliorino, (and all other NOW defendants), are not in economic competition with plaintiff Summit or the class of women and abortion clinics that are party to this suit. Although the intended immediate result of their actions is not to precipitate legislative action in their favor,[41] this court finds that the *Noerr-Pennington* doctrine has broader implications which require constitutional protection of political (or social) expression aimed at effecting political (or social) change that falls short of legislative action.

Indeed, there is a notable amount of caselaw addressing the question whether the *Noerr-Pennington* doctrine brings first amendment principles to bear on state law tort claims. *See, e.g., State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 50-51 (8th Cir. 1989) (applying first amendment analysis to a state claim for tortious interference with contractual relations), *cert. denied*, 493 U.S. 1023, 110 S. Ct. 726 (1990); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988) (applying defamation and *Noerr-Pennington* analyses to tort claim based on defendants' actions in alerting authorities to plaintiff's violations of law); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (applying *Noerr-Pennington* and its sham litigation exception "to protect the First Amendment right to petition against claims

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[41] *See NOW v. Scheidler*, 968 F.2d 612, 616 (7th Cir. 1992), *rev'd on other grounds*, 510 U.S. 249, 114 S. Ct. 798 (citing *NAACP v. Claiborne Hardware, Inc.*, 458 U.S. 886, 916, 102 S. Ct. 3409, 3427 (1981) ("Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior.")).

of tortious interference with business relationships"); *Sierra Club v. Butz*, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972) (applying first amendment analyses of *Noerr-Pennington* and defamation cases to state counterclaim for interference with advantageous relationship); *Florida Fern Growers, Inc. v. Concerned Citizens of Putnam County*, 616 So.2d 562, 569 (Fla.1993) (declining to follow *Sierra Club v. Butz*). In *Havoco of Am., Ltd. v. Hollobow*, the Court of Appeals for the Seventh Circuit adopted in full the district court's opinion which applied *Noerr-Pennington* and its sham litigation exception "to protect the First Amendment right to petition against claims of tortious interference with business relationships." 702 F.2d 643, 649 (7th Cir. 1983). The court stated:

> The First Amendment guarantees defendants' right to attempt to enlist the government on this side of the dispute. That this petitioning activity may have had incidentally an adverse effect on plaintiff's business, even that defendants knew this and intended such a result, has no effect in the First Amendment's protection, as long as the activity represents a genuine attempt to influence government action.

702 F.2d 651, 650 (7th Cir. 1983) (appendix) (citing *Noerr*, 365 U.S. at 143-44, 81 S. Ct. 532-33; *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615 (8th Cir. 1980); *Central Bank of Clayton v. Clayton Bank*, 424 F. Supp. 163, 165 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir.), *cert. denied*, 433 U.S. 910, 97 S. Ct. 2978 (1977)).

In the instant case, defendant Migliorino's conduct was directed at achieving a strictly political objective--interference with the constitutional right of women to have an abortion and

plaintiff Summit's constitutional right to conduct a lawful business--through the infliction of economic harm. (*See* Pls. Migl. Ex. 3 (Migl. Depo. 7/23/90) at 59-60). The purpose of defendant Migliorino's campaign was not to destroy legitimate economic competition. As stated earlier, defendant Migliorino is not an economic competitor of plaintiff Summit. Thus, while it is a longstanding maxim of First Amendment jurisprudence that the First Amendment provides no defense to persons who use otherwise protected speech or expressive conduct to coerce or aid others to act in violation of a valid conduct-regulating statute, *see, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-89, 93 S. Ct. 2553, 2560-61 (1973) (holding that ordinance making it unlawful to "aid" sexually discriminatory employment practices could be constitutionally applied to bar newspaper advertisements for sex-designated employment); *Hughes*, 339 U.S. 460, 70 S. Ct. 718 (permitting restraint against peaceful picketing designed to force employer to engage in discriminatory hiring practices in violation of state policy); the Court has made it equally clear that nonviolent political expression is deserving of the utmost protection under the constitution. *E.g., Claiborn*, 458 U.S. 886, 912, 102 S. Ct. 3409, 3425.

In that respect, the Court has observed that, "[w]hile States have broad power to regulate *economic* activity, we do not find a comparable right to prohibit peaceful *political* activity . . . . '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Id.*, 458 U.S. 886, 912, 102 S. Ct. 3409, 3425 (emphasis added) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209 (1964)). In *Claiborne*, the boycotts were intended to force compliance with antidiscrimination laws. The Court noted,

> "the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."

458 U.S. 886, 914, 102 S. Ct. 3409, 3426; *cf. Serfecz v. Gallitano*, 1995 WL 680829, *3 (N.D. Ill. Nov. 14, 1995) (where petition is a conspiracy to violate constitutional rights first amendment privilege does not apply). Similarly, the nonviolent acts of defendant Migliorino (and the other named defendants), while not intended to effect legislative action, are intended to apply economic pressure and, in that way, to force economic and political change.

In *Jews for Jesus v. Jewish Comm. Rel. Council of N.Y.*, the Second Circuit held that a boycott used to secure an unlawful objective is not entitled to First Amendment protection. 968 F.2d 286, 289 (2d Cir. 1992). Plaintiffs rely on *Jews for Jesus* as support for their argument that defendants' acts are unprotected under the First Amendment. In that case, one of the defendants contacted a third party, Stevensville, with whom the plaintiff organization had contracted for accommodations for an annual convention. *Id.* at 289. The defendant allegedly told Stevensville that "the only thing that made economic sense . . . was to cancel Jews for Jesus' reservations" and that if the Stevensville did not break the contract, "there would be a total boycott of the Stevensville [ ] by the Jewish community," "there

would be a one hundred and eighty degree turnaround in Jewish support for the Stevensville" which "would result in a very stiff penalty," and the Jewish Press would be contacted. *Id.* Distinguishing *Jews for Jesus* from the *Claiborne*, the court noted that "the instant conduct was not political speech designed to secure governmental action to vindicate legitimate rights, but was a series of private communications in the context of a private dispute. Accordingly, the safe harbor carved out by *Claiborne* for certain boycott activity is unavailable to defendants." *Id.* at 298.

The instant case may be easily distinguished from *Jews for Jesus* since Migliorino's letter-writing campaign is a quintessential example of nonviolent political activism and is not intended to induce a violation of the law. Migliorino's acts do not promote the violation of any conduct-regulating statutes like the antidiscrimination statutes at issue in *Jews for Jesus*. Even if this case was not factually different, it is questionable whether *Jews for Jesus* is correct. It is subversive of First Amendment protections for the determination of whether speech-related conduct is protected to turn on whether the object of the conduct is to promote or deny certain rights rather than others. Frequently, opposing rights are inversely related. This court is not persuaded that the proper balance is struck by a rule that prohibits speech that encourages or threatens concerted peaceful activity in aid of discriminatory conduct. The First Amendment does not permit the government to directly or indirectly prefer one object of speech over another. Thus, the First Amendment commands that the government not interfere with a peaceful march protesting the integration of a public school even though the march is in opposition to rights recognized by law.

Finally, as stated above, Migliorino's acts are not aimed to destroy economic competition but rather to effect political and social change--the fertilizer of healthy government. The court therefore concludes that the application of the state law of tortious interference with contractual relations to Migliorino's conduct in this case would violate the First Amendment.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is hereby GRANTED as to defendant Project Life on plaintiffs § 1962(c) and (d) RICO claims, and as to all defendants on plaintiffs' § 1962(c) RICO claim to the extent that it is based on the predicate acts of murder, arson, or kidnaping. IT IS FURTHER ORDERED THAT defendants TPO's motion as to defendants Terry and OR on the remaining portions of plaintiffs' RICO claims is hereby DENIED. As to defendant Migliorino's motion for summary judgment, the court resolves that the motion is hereby GRANTED as to plaintiffs' § 1962(c) and (d) RICO claims and state law claims.

ENTER:

David H. Coar
United States District Judge

Dated: September 19, 1997

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge
or Magistrate Judge — David H. Coar

CASE NUMBER 86 C 7888 **DATE** 9/17/1998

CASE TITLE N.O.W. vs. Scheidler, et al

DOCKET ENTRY:

(10) ■ [Other docket entry] Defendant Operation Rescue's Motion for Remittitur, or Alternatively, a New Trial is Denied.

APPENDIX G

No. 86 C 7888

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly-situated clinics, Plaintiff,

v.

JOSEPH M. SCHEIDLER; ANDREW SCHOLBERG; TIMOTHY MURPHY; PRO-LIFE ACTION LEAGUE, INC.; and OPERATION RESCUE, Defendant.

July 16, 1999, Decided

July 28, 1999, Docketed

MEMORANDUM OPINION AND ORDER

Before this court are various post-trial motions filed by both the defendants Joseph Scheidler and Operation Rescue ("defendants") and the two plaintiff classes represented by the

National Organization for Women ("NOW") and two reproductive health clinics, Delaware Women's Health Organization, Inc. ("DWHO") and Summit Women's Health Organization ("Summit") (together, as "plaintiffs"). Defendant filed a motion to decertify the class of NOW members and non-members as well as decertify the class of clinics. The plaintiffs filed a motion to amend the complaint to conform to the evidence as well as a motion for Phase II damage trials. Plaintiffs also filed a petition for injunctive relief. Defendants' motion for decertification of the two classes is DENIED. Plaintiffs' motion to amend the complaint to conform to evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction against defendants for a period of twelve years. All other motions are denied as moot.

Background

After thirteen years, this long and controversial case is entering one of its final stages. This case consists of a plaintiff class of reproductive health clinics and a class of potential women patients who brought claims arising under § 1962 of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO") against the defendants, a group of anti-abortion protestors. After a lengthy trial that occurred from March 4, 1998 through April 14, 1998, the jury returned a verdict for the plaintiffs on these civil RICO claims. While the procedural history of this case is recounted in detail in previous opinions,[1]

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[1]*See generally NOW v. Scheidler*, 510 U.S. 249 (1994); *NOW v. Scheidler*, 968 F.2d 612 (7th cir. 1992), *cert. granted*, 508 U.S. 971 (1993); *NOW v. Scheidler*, 1997 WL 610782 (N.D. Ill. 1997); *NOW v. Scheidler*.

(continued...)

the evidence presented at trial must be reviewed in order to understand the post-trial motions before this court.

At the trial, evidence spanning a period of twelve years of various incidents at reproductive health clinics was presented. This evidence included incidents across the entire United States: Chicago, Illinois; Wichita, Kansas; Cherry Hill, New Jersey; New York, New York; Farmington, Michigan; Jackson, Mississippi; Dobbs Ferry, New York; Fargo, North Dakota; Wilmington, Delaware; Atlanta, Georgia; San Antonio, Texas, to name a few. Several of these events were videotaped and showed defendant protestors chaining themselves to clinic doors and surrounding patients to block their path to the clinic entrances. Over the weeks of the trial, witnesses testified to the various acts of the defendants and others. A select few are described below:

--In Washington, D.C., busloads of protestors rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed. As one witness testified, "several of us started yelling as loud as we could, 'please stop pushing. We're going to get hurt." (Transcripts, p. 1008).

--In Milwaukee, Wisconsin, protestors repeatedly banged on the car of a patient as she entered a health clinic parking lot, and grabbed at her arms and legs as she attempted to enter the clinic. "They surrounded me and my car. Telling me I wasn't a

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[1](...continued)
897 F. Supp. 1047 (N.D. Ill. 1995); *NOW v. Scheidler*, 1995 WL 592228 (N.D. Ill. 1995).

Christian, a baby killer. That I'm going to go to hell for this. Shoving pamphlets in my hand. Trying to stop me from making my way to the door of the building." (Transcripts, p. 1916). The patient was visiting the clinic to receive her pap smear results and to receive her contraceptive medication.

--In Wilmington, Delaware, protestors forcibly entered a clinic and wreaked havoc. These protesters destroyed medical equipment, entered operating rooms where clinic staff and patients were engaged in appointments, tore down cabinets, destroyed medication and medical equipment, and chained themselves to medical and operating room tables. (Transcripts, p. 663).

--In Chico, California, a clinic administrator and two clinic escorts were physically smashed up against the entrance doors of a clinic by hundreds of protestors for four and a half hours. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout, "Don't pay any attention to them. They're murderers. They're baby killers. Whatever happens to them is God's will." (Transcripts, p. 1445). The glass entrance to the clinic was shattered and the clinic administrator received bruises on her legs and arms from the event.

--In Los Angeles, California, a patient who was visiting a health clinic was assaulted by protestors. The patient had an appointment at the clinic for follow-up after a surgery to repair and restore her reproductive organs. However, she was confronted by the defendant protestors before she could enter the clinic:

> "All of a sudden, a crowd of people came running from both sides of the building towards the parking lot, towards us. . . They were shouting 'murderer, baby murderer.' . . somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of these people, and they were grabbing their arms and grabbing at me. I didn't know what was happening, and I was yelling for [my friend] to help me. Then [my friend] was pushing the people away, and they were fighting. . . I remember rolling down the side of the car, and the people were hitting me. Then I remember looking up to call out to ask God to help me. As I looked up and yelled 'oh, God help me,' a man hit me in the head with a big old sign. It was at this point that I grabbed [my friend's] arm and [he] grabbed me, and I put my arms around [his] waist. Then [he] was pushing the people away, and they were still grabbing and pulling at me. Then I felt myself going down, and I got scared, real scared. It was just so many people, and they were fighting and grabbing at me, and they were yelling thing like 'murderer.' I wondered, who did I kill? Who did I hurt?" (Transcripts, p. 1519).

The patient lost consciousness as she began to bleed from her abdomen for protestors had caused her surgical incision to be torn open. Protestors rocked and beat her car as clinic personnel rushed the patient to the trauma unit of a nearby hospital. (Transcripts, pp. 1520-1522).

These are just a few examples of the incidents presented to the jury throughout this trial. Repeatedly, witnesses testified to the fear and intimidation they felt from the actions of protestors.

One clinic volunteer testified, "They were . . . shoving and elbowing and smashing. I mean, they were right within less than an inch of us. . . You know, you start sweating. You're scared. Your heart's pounding." (Transcripts, p. 1444). A patient recounted, "I was hysterical. I was afraid. I thought they were going to kill me." (Transcript, p. 1522). A clinic administrator reflected, "I was concerned about the injury to our staff and to our patients, not only the physical injury of the building itself and the equipment but also the emotional injury and distress to our patients and to our staff, who were terrified . . ." (Transcripts, p. 663).

These incidents were connected to the organizational efforts of the Pro-Life Action Network (PLAN) and Operation Rescue (OR) and the leadership of these organizations through Joseph Scheidler and other named defendants. PLAN was founded in 1984 to bring anti-abortion activists together to coordinate their activities across the United States. Scheidler and the founding members of PLAN believed that the lobbying and legislative efforts of other anti-abortion organizations, such as the National Right to Life, were not effective. (Transcripts, p. 3936). PLAN founding members believed in more "aggressive tactics," such as blocking clinic doors with their bodies and other objects in order to stop clinic patients and staff from entering the clinic, a tactic called "rescues." (Transcripts, pp. 3936-37). Scheidler, John Ryan, and Andrew Scholberg laid the initial groundwork for PLAN.

The first meeting of PLAN occurred in Ft. Lauderdale, Florida in 1984. Over 600 activists attended, with Scheidler acting as the chair of the meeting. (Transcripts, pp. 3974, 4124). At that meeting, the "Leadership Council" was created

with a geographic distribution to cover the entire United States. (Transcripts, p. 3990). PLAN began its initial fund-raising efforts, promoting itself as an organization with over 2000 members with a network of regional directors to coordinate "rescue" activities. (Transcripts, pp. 3977-79). Eventually, PLAN created paid positions for a Director and an Associate Director, as well as paid for the travel expenses of the Leadership Council to various "rescues," or protests, across the country. (Transcripts, pp. 4098-99, 4255).

In 1987, at a PLAN Leadership Council meeting in Washington, D.C., Operation Rescue ("OR") was born. (Transcripts, p. 4085). The stated purpose of OR was to be "to overwhelm the law enforcement system and gain free access to the clinics without legal consequences." (Transcripts, p. 4091). The PLAN Leadership Council gave approval for the formation of OR, and to Randall Terry as its director, and agreed to OR's first field training, in Cherry Hill, New Jersey. (Transcripts, p. 4088). PLAN and OR began to act as joint organizations, where Randall Terry sat on the board of PLAN, Scheidler sat on the board of OR, and the two organizations began joint fund-raising efforts. (Transcripts, pp. 4087, 4226, 4253).

The stated purpose of both PLAN and OR was "to put clinics out of business." (Transcripts, pp. 4149). In particular, these two groups were to work "behind the scenes" of the anti-abortion movement and use aggressive tactics, such as "rescues" and massive demonstrations. (Transcripts, pp. 4091, 4124). PLAN and OR achieved these goal in various ways. To communicate to PLAN members, Scheidler had a daily "hotline" for members to call, where times and locations of protests were announced. (Transcripts, pp. 3949, 4128). PLAN

also issued a regular newsletter, promoting future protest events as well as reporting the results of various organized PLAN activities. (*Id.*). Scheidler himself also gave "advice" to PLAN members through the hotline and newsletters, as well as through PLAN speaking events. For example, Scheidler instructed PLAN members to "case out" clinics to learn their layout and make clinic staff know that they were "vulnerable." (Transcripts, p. 3930). Scheidler also advised members, when at protests, to not obey orders of clinic personnel. When he visited local PLAN groups, Scheidler insisted that at least some of the members enter the clinic facility when they were engaged in a protest. (Transcripts, p. 3932). Through the use of PLAN newsletters, speaking events, and conventions, PLAN leadership supported illegal tactics, such as physically entering clinics and blocking procedure rooms. (Transcripts, p. 3941). In fact, Scheidler took pride in the fact that PLAN created the "lock and block," where protestors physically lock their bodies to the doors of clinics or other large objects in front of clinic doors. (Transcripts, p. 4124).

The most significant organizing tool for defendants was the annual PLAN convention, was held in different cities across the country. Evidence was presented about the PLAN convention, and the resulting activities, for each year from 1985 until 1997. Only a select number of these conventions will be highlighted here.[2] For example, in 1985, at the PLAN convention in

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[2]Each year the PLAN conference occurred, PLAN organized protests closed the clinics in that area. In Chicago in 1988, PLAN conducted workshop trainings on "lock and block" that were used in Chicago that year. (Transcripts, p. 4100). In Jackson, Mississippi in 1990, three clinics were closed by protestors during the PLAN conference. (Transcripts, pp. 4114-

(continued...)

Appleton, Wisconsin, PLAN members agreed to create "a year of pain and fear in the abortion industry." (Transcripts, p. 4006). One step towards that goal was a planned "Christmas Truce," where PLAN members were to return to their home communities and write the reproductive health clinics in their area to inform them that during month of December they would have to "close or be closed" by protesters blocking their doors. (Transcripts, p. 4007). In Chicago, PLAN sent these letters to every single reproductive health clinic that provided abortions in the area. (*Id.*).

In 1989, at the PLAN conference in Livonia, Michigan, PLAN members organized clinic protests to occur in Farmington, Michigan during the conference. (Transcripts, p. 4108). Several hundred protestors closed the clinic in Farmington and the "success" of the protests was reported in the PLAN newsletter. (Transcripts, pp. 4109-12). In 1991, clinic protests occurred for weeks in Wichita, Kansas shortly after the PLAN convention held there. (Transcripts, p. 4122). PLAN leadership were significantly involved in the planning and execution of these protests. (Transcripts, pp. 4258-59).

PLAN created a successful design for the organizing of these protests. First, the protest would be announced on Scheidler's Hotline and communicated through PLAN members. PLAN leadership usually visit the site of the protest before it occurred.

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[2](...continued)
19, 4255). In San Antonio, Texas in 1992, clinics in the area were closed daily by protestors while the PLAN convention occurred. (Transcripts, pp. 4130-31). All of these protests were reported on Scheidler's Hotline and in the PLAN newsletter, praising the involvement of PLAN members, after they occurred. (Transcripts, pp. 4101, 4255, 4131).

After the protest and clinic closing occurred, the results would be reported in the PLAN newsletter. For example, in Wilmington, Delaware in April of 1986, Scheidler entered, without permission, a reproductive health clinic with three other PLAN members and stated he was "casing the place." Even though he was asked to leave, he roamed throughout the clinic. (Transcripts, pp. 4036-39). The next day, a protest occurred and PLAN members entered the clinic and caused considerable property damage by destroying equipment. (Transcripts, p. 633). PLAN reported this protest in its newsletter and other public relations materials and described it as a "fun time." (Transcripts, p. 4039). This same pattern occurred in Pensacola, Florida in March of that same year. (Transcripts, p. 3914). Members of the PLAN Leadership Council met in Pensacola and discussed how an "invasion" of this particular clinic could be orchestrated. It was agreed that some members would enter the waiting room of the clinic and others would enter the clinic through the back door. (Transcripts, p. 4012). The next day, the clinic was invaded by protesters, who "trashed the place," causing serious damage to surgical equipment and other medical supplies. The protesters were arrested. (Transcripts, pp. 4013-25). PLAN continued to use this same pattern of organizing, communication, and protest to close clinics throughout the country, as seen in New York City in 1988; Chicago in 1984, 1989, and 1996; Houston, Texas in 1990; and Dobbs Ferry, New York in 1991. (Transcripts, pp. 3996, 4095, 4113-14, 4119, 4190, 4256). The jury heard evidence tending to show that the objectives of the defendants at various protests included peaceful protest, informational picketing and leafleting, and acts of passive resistance in combination with intimidation (including violence and threats of violence) to stop abortions.

After reviewing the evidence, the jury returned a verdict for the plaintiffs on their civil RICO claims. In particular, the jury found 21 acts or threats involving extortion against patients, prospective patients, doctors, nurses, and/or clinic employees in violation of federal law, 25 in violation of state law, and four acts or threats of physical violence to persons or property. Defendants were found liable for $ 54,471.28 in monetary damages to Summit Women's Health Organization and for $ 31,455.64 in monetary damages to Delaware Women's Health Organization.

Since the trial was completed, both defendants and plaintiffs have filed various motions as steps towards bringing this case to its conclusion. In order to expedite this process, this court held a hearing on the issue of injunctive relief in July of 1998. This court now addresses all remaining motions in this case.

Analysis

I. Decertification of the Classes

A. Decertification of NOW

Defendants argue that NOW should be decertified as the class representative for NOW members and non-NOW members because NOW lacks standing as an association. Citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Defendants argue that the testimony of four anonymous female witnesses at trial showed that individual participation of NOW members and non-NOW members was required to prove their claim, thus violating the third criteria for associational standing.

(Dft's Corrected Motion for Decert., pp. 5, 12-13).

This court in a previous decision in this case found that NOW had associational standing under the *Hunt* test. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068-69 (N.D. Ill. 1995), citing *Hunt*, 432 U.S. at 343. In particular, the court found that NOW met the third criteria of the *Hunt* test, i.e. that the claim and the relief do not require individual participation in the lawsuit, for NOW was only suing for injunctive relief, an appropriate form of relief for an association to seek. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068-69 (N.D. Ill. 1995), citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The court stated in that opinion:

> "It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate Hunt's third prong." 897 F. Supp. at 1070.

The resulting testimony of the four anonymous witnesses at trial did not violate the third prong of *Hunt* test and therefore NOW maintains standing.

B. Decertification of the Clinic Class: Summit and the Wisconsin litigation

Defendants argue that Summit, one of the representatives of the Clinic Class, is precluded from bringing the claims on behalf of the class because of a dismissal with prejudice of claims brought on similar facts in Wisconsin state court. (Dft's Motion for Decert., p.3; Dft's Corrected Memo in Support of Decert., p.4 fn.8). Therefore, the Defendants argue, under

Wisconsin law and the full faith and credit clause, 28 U.S.C. § 1738, Summit is subject to claim preclusion.[3]

On August 25, 1997, Summit (under the auspices of the National Women's Health Organization of Summit, Inc.), along with the Milwaukee Women's Medical Services and Planned Parenthood of Wisconsin, filed state claims alleging invasion of privacy, assault, and public and private nuisance by Joseph Scheidler, PLAN, and other defendants in the present case, and demanded temporary and permanent injunctive relief, as well as compensatory and punitive damages. (Dft's App. to Post-Trial Motions, Vol. I, Ex. A). On September 22, 1997, an Amended Complaint was filed that did not include Summit as a plaintiff nor Joseph Scheidler nor PLAN as defendants. (Dft's App. to Post-Trial Motions, Vol. I, Ex. L). Counsel for Summit and Scheidler signed a stipulation and order for dismissal on December 1, 1997, that stated that the claims were dismissed with prejudice and a final order for dismissal was signed by Wisconsin Circuit Court Judge Charles Kahn. (Dft's App. to Post-Trial Motions, Vol. I, Ex. R). However, on February 24, 1998, just three days before the present case was to go to trial, Summit presented a motion to the Wisconsin Circuit Court to reopen and modify the stipulation and order for dismissal. (Dft's Appl to Post-Trial Motions, Vol. I., Ex. T). In response to the

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[3]The Defendants argue that DWHO is also precluded because DWHO is in privity with Summit. However, there is no mention of DWHO, a Delaware-based clinic, anywhere in the papers of the Wisconsin case, nor have the Defendants present any evidence connecting DWHO to Summit. Therefore, the court will only consider the Defendants' claim preclusion arguments as they apply to Summit. After the trial was over and the instant motions were briefed, the Scheidler defendants sought to reopen the record, presumably to attempt to demonstrate "privity." That request was denied as untimely.

motion and a hearing on the matter, on February 26, 1998, Judge Kahn signed an order for dismissal that dismissed Summit's claims against Scheidler with prejudice, but with the stipulation that, "it is not the intent of this court that this order have any effect upon *National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.*, Case No. 86 C 7888 in the United States District Court for the Northern District of Illinois, Eastern District." (Dft's Appl. to Post-Trial Motions, Vol. I., Ex. BB). On May 4, 1999, the Wisconsin Appellate Court reversed Judge Kahn's order and the cause has been remanded. *Milwaukee Women's Medical Service, Inc. v. Joseph Scheidler et al.*, No. 98-1139-FT, May 4, 1999 (Dft's Motion for Leave to Add to the Record, Attachment A).

Res judicata is an affirmative defense that must be raised or lost and the burden of establishing preclusion is upon the party claiming it. Fed. R. Civ. P. 8(c); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §§ 4404, 4405. Counsel for Scheidler did not properly raise the defense prior to trial. The original dismissal in the Wisconsin case was filed December 1, 1997. However, in the over 500 pages Defendants filed in February, 1998 with the Final Pretrial Order, the Wisconsin litigation was never mentioned. Counsel for Scheidler did not inform the court of the Wisconsin litigation and its dismissal until February 19, 1998, in Defendant's Motion for Continuance of All or Part of the Final Pretrial Conference or Trial. (Dft's Mot. for Cont., p. 14). In that motion, counsel for Defendant only states that claims filed by Summit against Scheidler in Wisconsin Circuit Court were dismissed with prejudice. (Id.). However, the counsel for Defendant never informed or even stated to this court what the Wisconsin state claims were. At the Final Pretrial Conference,

Counsel for Defendant mentioned the litigation in Wisconsin again, but only as a support for his argument for continuance of the Final Pretrial Conference and not as an argument for res judicata. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 10-12). When asked repeatedly and directly by the court what the Wisconsin litigation had to do with the present case, Counsel did not answer the question. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 9-16). The court clearly stated to counsel that if he was requesting an order, he should submit it to the court in writing.[4] Neither before nor during trial did Counsel ever submit to this court any coherent statement of the position now asserted nor proffer any orders from the Wisconsin Circuit Court stating that there was a final judgment in that case. Therefore, the defendants did not timely raise the affirmative defense of res judicata and the defense is now lost.

Even if Counsel for Defendant had timely raised the res judicata defense before trial, Summit would not have been precluded from litigating these claims in federal court, for Judge Kahn of the Wisconsin Circuit Court ordered in his stipulation that the order for dismissal was not intended to affect the present case. (Dft's App. to Post-Trial Motions, Vol. I., Ex. BB). The most this court would have done is stayed the proceedings until the appeal of the Wisconsin state court

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[4]After continuous questioning of counsel, the court stated, "Mr. Brejcha, I have urged you since my involvement in this case not to mention matters to this court. That if you have something that you think is sufficiently important that affects the proceedings in this court, to put it in writing. The Federal Rules of Civil Procedure make it quite clear that a request for an order must be in writing except if the request is made during a hearing. So mentioning things in passing in court is of no particular moment." (Final Pretrial Conference Transcripts, February 20, 1998, pp. 15-16).

judgment had been decided.[5] *Rogers v. Desiderio*, 58 F.3d 299, 302 (7th Cir. 1995) (finding that when a state court decision that could have claim preclusive effects on a federal case is appealed, the federal court should stay proceedings until the state case has reached a conclusion). When a state court has reached a final judgment that would have claim preclusive effects over pending federal litigation, the federal court must respect that judgment. *Majeske v. Fraternal Order of Police, Local Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996). The Full Faith and Credit Act provides in part that the "judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state." 28 U.S.C. § 1738. The Act "thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 116 S. Ct. 873, 877 (1996), quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982). Federal courts must accept that state's rules for determining the effect of the judgment. *Matsushita Electric*, 116 S. Ct. at 877.

Wisconsin has adopted a transactional approach to determining claim preclusion which extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 525 N.W.2d 723, 728-9

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[5]However, it is unclear from the papers submitted by Defendants if the Wisconsin trial court dismissal and stipulation was appealed before or after the trial in this present case.

(1995), citing *Restatement (Second) of Judgments* § 24 (1982). However, under Wisconsin law, trial courts have broad discretion in crafting dismissals. "[A] trial court may totally accept or reject a stipulation presented by the parties for its approval." *Phone Partners Ltd. Partnership v. C.F. Communications Corp.*, 196 Wis. 2d 702, 709, 542 N.W.2d 159, 161 (Ct. App. 1995). Once the court approves a stipulation, it becomes the court's judgment. *Id.*; Wis. Stat. § 806.07(1). Therefore, if Defendants had raised their res judicata argument before the trial in this case, this court would have recognized the final judgment of the Wisconsin trial court and would not have found that the dismissal had a preclusive effect on the present case, since the stipulation specifically states that the dismissal has no effect on the present case. Since the trial and verdict in the present case, the Wisconsin Supreme Court has reversed and remanded Judge Kahn's dismissal and stipulation, stating that the Wisconsin trial court abused its discretion in approving the stipulation. *Milwaukee Women's Medical Services*, No. 98-1139-FT, May 4, 1999, p. 8. However, at the time that this court would have had to decide the preclusive effects of the Wisconsin case, this court would have had to respect the judgment of the Wisconsin trial court. It was not, and is not, the place of this court to go back and determine the legal validity of the Wisconsin trial court, but instead to respect the judgment of that court. *Kremer*, 456 U.S. at 482.

II. Rule 15(b): Amend Complaint to Conform to Evidence

The plaintiffs have moved under Fed. R. Civ. P. 15(b) to amend their complaint to include a claim arising under the Freedom of Access to Clinic Entrances Act. 18 U.S.C. § 248(a)

("FACE"), and state law extortion, assault, trespass, and tortious interference with prospective economic advantage. (Pls' 15(b) Motion, p. 2). The plaintiffs argue that the factual issues that underlie these claims were presented at trial. In particular, the plaintiffs assert that the defendants presented several pieces of evidence themselves that would support FACE and state law tort claims and that defendants did not object when plaintiffs presented similar evidence at trial. (Pls' 15(b) Reply, pp. 2, 4). This evidence is the same evidence that supports the predicate acts of RICO upon which the jury found the defendants liable. (Pls' 15(b) Reply, p.5). That is, no doubt, the reason that defendants failed to object.

The defendants vigorously respond that they objected to the use of any evidence that was outside of the pleadings at trial. (Dfts' Resp. to Pls' 15(b), p.2). Also, any evidence that they admitted that supports a FACE or a state law tort claim was admitted for another purpose. (Id.). Finally, the defendants argue that amending the complaint to include FACE and state law tort claims would be prejudicial to the defendants, for the jury was not instructed on FACE or state law tort claims and thus no individuals were named in the jury findings. (Dfts' Resp. to Pls' 15(b), pp.6-7).

A. Standard for 15(b)

Rule 15(b) states in part:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in al respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause

them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . ."

Fed. R. Civ. P. 15(b)

Rule 15(b) creates a system in which "the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence." *Duckworth v. Franzen*, 780 F.2d 645, 649 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). The Intent of Rule 15(b) is "to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *In re Prescott*, 805 F.2d 719, 725 (7th Cir. 1986), quoting *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982). A Rule 15(b) amendment can occur either before, during, or after trial. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1491 (1990).

The key factor in determining whether an amendment should be allowed is whether the issue has been tried with the express or implied consent of the parties. *Winger v. Winger*, 82 F.3d 140, 144 (7th Cir. 1998); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 456 (7th Cir. 1988); *Prescott*, 805 F.2d at 725. The test for this consent is "whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment." *Prescott*, 805 F.2d at 725, quoting *Hardin*, 691 F.2d at 456 (10th Cir. 1982). For an opposing party to give implied consent, the party must either have not made the objection that the evidence presented at trial was outside of the pleadings, or the opposing party must have introduced the evidence his or herself. *Prescott*, 805 F.2d at 725. Therefore,

Rule 15(b) requires the opposing party to show that he or she will be prejudiced by the amendment. Wright, Miller Kane, Federal Practice and Procedure: Civil 2d § 1495 (1990). The decision as to whether the issue in the amendment was actually tried by implied or expressed consent is within the district court's discretion. *Ippolito*, 864 F.2d at 456.

While Rule 15(b) is quite liberal, that does not mean that a motion to amend a complaint will automatically be granted. "[A] court will not imply consent to try a claim merely because evidence relevant to a properly plead issue incidentally tends to establish an unpleaded claim." *Ippolito*, 864 F.2d at 456, quoting *Quillen v. International Playtex, Inc.*, 789 F.2d 1041, 1044 (4th Cir. 1986). Furthermore, if the evidence presented by the opposing party that allegedly demonstrates consent is also relevant for another purpose, then the admission of the evidence is not considered consent and the pleadings should not be amended under 15(b). Wright, Miller & Kane, § 1493 (1990); see also, *Gorlikowski v. Tolbert*, 52 F.3d 1439 (7th Cir. 1995). Rule 15(b) also does not apply when the evidence does not support the theory upon which the court charged the jurors. *Jackson v. Crockarell*, 475 F.2d 746, 748 (6th Cir. 1973). Finally, the opposing party can defend against a 15(b) motion when the opposing party objected to the evidence during trial because it went beyond the scope of the pleadings. *Prescott*, 805 F.2d at 725.

B. Implied Consent

The plaintiffs argue that the defendants gave implied consent to the amended claims because they presented evidence themselves that supported the FACE and state law tort claims.

(Pls' 15(b) Reply, p.4). However, the court finds that the evidence to which the plaintiffs allude applies to the conspiracy claim and only incidentally to the FACE and state law tort claims. Granted, several of the defendants' witnesses testified to observing or participating in various protests in front of class clinics. However, that evidence was presented in the defense of their actions as free speech and not as an act of conspiracy. Presenting that defense does not consent to federal claims of FACE or state law tort claims. Therefore, this evidence was relevant to another issue in the case.

More troubling for the court, however, is that the evidence that plaintiffs argue supports FACE and state law tort claims does not support the theory that was presented to the jury. In order for the jury to find the defendants liable under RICO, plaintiffs had to show that PLAN demonstrated conduct of an enterprise through a pattern of racketeering activity. *NOW v. Scheidler*, 1997 WL 610782, *6 (N.D. Ill. 1997), citing *Richmond v. Nationwide Cassel, L.P.*, 52 F.3d 640, 644-47 (7th 1995). The court instructed the jury that the plaintiffs had to show that PLAN was an enterprise that affected interstate commerce and that each defendant was associated with PLAN, was involved in operating and managing PLAN, and that each defendant's participation in PLAN was through some pattern of acts illegal under RICO. (Jury Instructions).

In contrast, under FACE, an individual may have criminal or civil penalties applied to them if that individual:

> "(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person

because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services . . .

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services. . ."

18 U.S.C. § 248(a)(1, 3).

In the present case, the jury followed the verdict form and found that the defendants or other persons associated with PLAN had committed acts or threats of extortion, acts and attempts of conspiracy, acts or threats of violence, in the last ten years. (Transcript, April 20, 1998, pp. 5185-91). However, the jury did not state which defendants did these acts or when they occurred, only the total number of acts.[6] Evidence was presented at trial from before and after the enactment of FACE, so the court does not know which evidence the jury relied upon in its findings. Since individuals are not named in the jury's findings, the court does not know who was found to have the requisite intent for FACE of the state law tort claims. Since the clinic incidents from across the country were presented and the plaintiffs have not stated which state law they claim, the court also does not know which state law to apply in the amended

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[6]The jury found 21 acts or threats of extortion in violation of federal law; 25 acts or threats of extortion under state law; 25 attempts or conspiracy to do any of the previously mentioned acts; and 4 acts or threats of physical violence to persons or property. The jury also found that these acts occurred within the last ten years and proximately caused injury to the business and property of the two clinics and the NOW class members. None of the jury's findings was based solely on blockades of clinic doors or sit-ins within clinics. (Transcript, April 20, 1998, pp. 5183-91).

state law tort claims.[7] Therefore, the court finds that the plaintiffs' motion to amend the complaint to conform to the evidence is denied.[8]

Finally, as discussed later, there was some evidence presented after trial as to conduct at clinics after FACE was enacted. That evidence was offered to rebut defendants' claim that injunctive relief was unnecessary because FACE provided plaintiffs with a more focused remedy for addressing clinic blockades. That evidence was limited in nature and fails to establish a basis for the injunctive relief sought.

III. Phase II Damage Trials

In the plaintiffs' Motion in Support of Phase II Trials for Absent Class Members, the plaintiffs argue the parties agreed before trial to conduct the litigation of this case in two phases: the first phase ("Phase I") would determine if the defendants were liable under civil RICO and would feature two representative clinics for the plaintiff clinic class. Phase I of the trial was conducted in March and April of 1998 and the jury returned with a verdict in favor of the plaintiffs. The proposed second phase of the litigation ("Phase II") would be a series of damage trials at which other members of the plaintiff clinic class would have an opportunity to prove their individual monetary damages. (Pl's Motion for Phase II Reply, pp. 2-3). According to the plaintiffs, the concept of two phases of trial

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[7]The issue will be addressed in more depth in the section on the damage trials.

[8]Defendants' 12(e) Motion for a More Definite Statement is denied as moot.

has ruled this case through all the stages of litigation: from discovery and the notice to class members to the final pre-trial order and the final pre-trial conference. (Id.). Citing the *Manual for Complex Litigation*, the plaintiffs argue that the two-phase model for complex class actions is common. *Manual for Complex Litigation*, § 33.28 at 328, 330 (3d ed. 1995); *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996). Finally, the plaintiffs state that the defendants never objected to the bifurcation of the liability and damages issues for trial and in fact agreed to the two stages of trial at one of the pretrial conferences. (Pl's Motion for Phase II Reply, p.5).

The answer to the question of whether to have separate trial for litigation and damages is left to the discretion of the trial court based upon the circumstances of the case before it. Fed. R. Civ. P. 42(b); *In re Bendectin*, 857 F.2d 290, 308 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 ("Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant a separate trial of any kind of issue in any kind of case."); see also *Davis v. Freels*, 583 F.2d 337 (7th Cir. 1978); Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 481 (1995). While separate trials for separate issues in one lawsuit is not usual in large class action suits, a two-phase model has been used to promote efficiency. See *Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988); *Manual for Complex Litigation*, § 33.28. However, this model has not been used as frequently in RICO litigation, for the liability and damages questions are not so easily divided. *Manual for Complex Litigation*, §§ 33.82, 33.83, 33.86. A motion for bifurcation of the litigation is properly made at the pretrial conference. Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 483 (1995); see *Krueger v. New York Telephone Co.*, 163 F.R.D. 446

(S.D.N.Y. 1995).

In the present case, the plaintiffs argue that at the discovery stage they first argued for a two-phase trial. In the plaintiffs' Brief in Opposition to Defendants' Motion for Leave to File Interrogatories, the plaintiffs cited several cases that were two-phase class action litigations. See *Robertson v. National Basketball Association*, 67 F.R.D. 691, 700 (S.D.N.Y. 1975); *Gardner v. Awards Marketing Corp.*, 55 F.R.D. 460, 463 (D.Utah 1972). (Pl's Motion for Phase II Reply, Ex. B). However, these cases were used in the support of the argument that defendants could not obtain discovery of absent class members before the class was certified, not to support an argument for the bifurcation of the case. The plaintiffs did not formally present a motion for a two-phase trial before the court at that time.

The plaintiffs argue that the Notice of Class Determination, approved by this court and sent to all women's health centers in the United States who were potential plaintiff clinic class members, included language that recognized that this litigation would occur in two phases. Part F of the Notice, titled "How to Stay in the Lawsuit," states,

> "After the first phase of the trial, if Plaintiffs prevail, you may be required to provide information or even to testify in a trial or other proceeding designed to establish the amount of damages, if any, that you suffered as a result f the Defendants' acts."

(Pl's Motion for Phase II, Ex. C).

While the notice does leave open the option for a second phase of litigation, the notice in and of itself does not establish that the court ruled on the issue or that the parties consented to a two-phase trial.

In the Final Pre-Trial Order, the plaintiffs argue that a two phase trial was discussed. In the Plaintiffs' Trial Brief, the plaintiffs argued that damages for the plaintiff clinic class should be determined in a Phase II trial. (Pl's Motion for Phase II Reply, p. 4, citing Pl's Trial Brief, p. 11). Relying on General Rule 5 of the Northern District of Illinois, Standing Order on Pretrial Procedures in Civil Cases, the plaintiffs argue that the trial briefs are incorporated into the Final Pre-Trial Order and are thus binding upon the parties. (Pl's Motion for Phase II Reply, pp.4-5). The plaintiffs state that the defendants did not object to the Final Pre-Trial Order and this two-phase model for the trial was agreed to by the defendant parties at the Final Pre-Trial Conference.[9]

There are several problems with the plaintiffs' argument. First, the discussion in the Plaintiffs' Trial Brief of a two phase

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[9]The exchange relied upon by plaintiffs to demonstrate that defendants agreed to a two-phase trial occurred at the Final Pre-Trial Conference:

THE COURT: Now, are there any other things that we need to take up?

MS. CLAYTON: Real quick matter. I think it goes without saying that the scope of this trial is the common question of the class action and the damages of the two lead plaintiffs, and other issues of absent class members will be reserved for later. We have never actually said that, but I assume that was the scope of it.

MR. CRAIN: Right.

trial was presented only as a "suggestion" to the court and consisted of only one paragraph in a fifteen page brief. The court does not consider that a formal presentation of the issue to the court. While the Plaintiffs' Trial Brief was attached to a draft of the Pre-Trial Order, the Final Pre-Trial Order that was signed and entered did not contain a copy of the Plaintiff's Trial Brief. However, within the signed and entered Final Pre-Trial Order is the statement, "6. The parties do not agree that the issues of liability and damages of the class member clinics should be bifurcated for trial." (Final Pre-Trial Order, p. 5). The plaintiffs argue that the language only refers to the two lead plaintiff clinics in the case, Summit and DWHO, but there is no additional language in the Final Pre-Trial Order to support such an argument. All language within the Final Pre-Trial Order is binding on the parties at trial. General Rule 5.00 of the Northern District of Illinois, Standing Order Establishing Pretrial Procedure, Section 6(d). Therefore, the parties did not consent to a two-phase trial.

As to the so-called agreement by defendants to a two-phase trial at the Final Pre-Trial Conference, the answer of "Right" by one of the defense counsel and the silence of other defense counsel to the comment by plaintiffs' counsel on the scope of the trial is not considered consent by this court. The court does not consider that sidebar discussion a formal presentation of the issue of the bifurcation of the trial to the court and the court did not rule on the issue of a two-phase trial at that time.

This court has made it very clear to all parties in this case that issues that affect the proceedings of this case must be placed in writing. (Final Pre-Trial Conference Transcripts, February 20, 1998, pp.15-16; *supra*, fn. 2). The Federal Rules

require it and the history of the proceedings in this case demanded it. The plaintiffs did not make a formal motion to bifurcate this litigation until after trial. A district court does not abuse its discretion when it denies a *sua sponte* motion for bifurcation when the parties did not make a motion for bifurcation prior to trial. *Bunch v. Bullard*, 795 F.2d 384, 390-91 (5th Cir. 1986). Therefore, the plaintiffs' motion in support of Phase II trials is denied.

IV. Injunctive Relief

A continuous issue in this case has been whether plaintiffs are able to petition for injunctive relief under civil RICO. Now that the trial is over and the monetary damages have been determined,[10] the issue of injunctive relief for the plaintiffs is the last issue to be addressed.

A. Injunctive Relief Available under RICO

Section 1964(a) of RICO, entitled "Civil Remedies," states:

"The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any

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[10]18 U.S.C. § 1964(c) provides that any civil plaintiff shall recover treble damages and a reasonable attorney's fee. Therefore, the monetary damages awarded to Summit and DWHO are trebled to $163,413.84 and $94,366.92, respectively.

person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

This court found in an earlier opinion in this case that private parties may petition the court for injunctive relief for civil RICO violations. *NOW v. Scheidler, et al.*, 897 F. Supp. 1047 (N.D. Ill. 1995). Granted, the circuit courts are split on this issue. *Conkling v. Turner, et al*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). The Seventh Circuit also has not ruled on this issue. However, this court is persuaded by the rationale of the opinions of the other circuits. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (finding that in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the plaintiff's favor, and a public benefit); *Humana, Inc. v. Avram A. Jacobson, M.D., P.a.*, 804 F.2d 1390 (5th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute); see also Batista, Civil RICO Practice Manual 169 (1987), § 6.13-The Availability of Injunctive Relief. This court also must follow the Supreme Court's instruction that "RICO is to be read

broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 498 (1985).

While an injunction may be an option under civil RICO, any possible injunction must pass muster under the First Amendment. The Supreme Court has noted in this very case that, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaged in protected expression." 510 U.S. 249, 264 (1994) (J. Souter, concurrence). As this court examines the potential of an injunction, the court will follow the Seventh Circuit's instruction to address, "if necessary, . . . which of the defendants' activities, . . . are protected by the First Amendment to the United States Constitution." *NOW v. Scheidler, et al.*, 25 F.3d 1053.

B. Standard for Injunctive Relief

A party seeking a permanent injunction must show that: 1) it has prevailed on the merits of its claim; 2) it has no adequate remedy under law; 3) the balance of equities tips in its favor, and 4) the issuance of the injunction serves the public interest. *Plummer v. American Institute of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). Obviously the plaintiffs met the first criteria when the jury returned a verdict finding the defendants liable under civil RICO. (Transcripts, April 20, 1998, pp. 5183-5191). The final three criteria must be examined.

1. No Adequate Remedy Under Law

Since RICO expressly provides for injunctive relief, this factor does not apply, and thus the plaintiffs do not have to show that they lack an adequate remedy under law. When Congress expressly authorizes injunctive relief to enforce provisions of a statute, a party need not show the lack of a adequate legal remedy. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566, 571 (7th Cir. 1984); *Pepsico, Inc. v. Redmond*, 1996 WL 3965 at *28 (N.D. Ill. 1995); *Special Education Services v. RREEF Performance Partnership-I, L.P.*, 13 A.D.D. 683 (N.D. Ill. 1995); *North Shore-Chicago Rehab. Inc. v. Village of Skokie*, 827 F. Supp. 497, 509 (N.D.Ill. 1993); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 822 (N.D.Ill. 1988); *Wilk v. American Medical Association*, 671 F. Supp. 1465, 1484-85 (N.D. Ill. 1987). The Seventh Circuit has held that for a statutory injunction, "the moving party only needs to show that there is some reasonable likelihood of future violations. . ." *Commodity Futures Trading Commission v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). As we shall see below, there is more than adequate evidence to make this showing.

2. Balancing the Equities and Serving the Public Interest

The threatened injury to the two classes of plaintiffs outweighs the potential harm to the defendants by an injunction. The evidence presented both at trial and at the injunction hearing shows that the defendants have a history of unlawful conduct. The jury found that in the last ten years, the

defendants committed repeated acts and threats of extortion against patients, prospective patients, and clinic personnel as well as acts and threats of violence to persons and property across the United States. (Transcripts, April 20, 1998, pp. 5187-88). These acts crossed the line of expression into the realm of threatening conduct. The Supreme Court has upheld injunctions against individual protestors and organizations of protestors of reproductive health clinics when there is a history of prior unlawful conduct by the protestors. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 fn. 6 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 762, 764 fn. 2 (1994). The Court in *Madsen* found that there was a significant governmental interest in the injunction in order to ensure public safety and order, to promote free flow of traffic on the streets and sidewalks, to protect property rights, and to protect a woman's freedom to seek pregnancy-related services. *Madsen*, 512 U.S. at 762. Considering the evidence relied upon by the jury in this case, and the evidence presented to the court in the injunction hearing on the actions of the defendants, the governmental interests are significant enough to justify a tailored injunction.

C. The Necessity of an Injunction in light of FACE

This court held a post-trial hearing to address the issue of whether the passage of FACE has addressed the defendants' conduct and thus has eliminated the need for an injunction in the present case. FACE was passed by Congress in May of 1994. At the hearing, evidence was presented of defendants' illegal activity since the passage of FACE. For example, plaintiffs presented evidence of butyric acid being placed in a reproductive health clinic in Orlando, Florida in May of 1998

during Operation Rescue's national rescue week in Orlando as well as videotape evidence of defendants blocking clinic doors and physically accosting plaintiffs as they attempted to enter a clinic in Chicago in August of 1996. (Transcripts, June 30, 1998, pp. 45-46, 92-95). Evidence was also presented of "lock and blocks" at a clinic in Milwaukee where defendants physically locked their bodies to automobiles that were parked in front of the clinic's doors, making it impossible for clinic staff and patients to enter the clinic. (Transcripts, June 30, 1998, pp. 97-98). These "lock and blocks" have been continuing in Milwaukee on an almost weekly basis since May of 1994. (Transcripts, June 30, 1998, p.98). Plaintiffs' witnesses testified at the hearing that various injunctions under FACE have been sought and implemented in order to address these activities, but the illegal conduct of the defendants continues as defendants cross state lines to avoid the jurisdiction of the various injunctions. (Transcripts, June 30, 1998, pp. 55, 73). Moreover, there was testimony supporting the conclusion that blitzkrieg tactics were sometimes used to swoop in on a clinic without warning so as to overwhelm available law enforcement personnel. (Transcripts, p. 4091).

This court finds that the defendants, as an enterprise, have continued to engage in illegal behavior that violates civil RICO since the passage of FACE and thus there is a significant governmental interest in ordering an injunction to enjoin such illegal conduct. The injunction should be national in scope, for plaintiffs have shown that injunctions that are geographically limited do not prevent defendants from engaging in illegal conduct. Where the need for an injunction is nationwide, the courts have consistently held that an injunction can and should be nationwide in scope both in the abortion protest context.

United States v. Dinwiddie, 76 F.3d 913, 929 (8th Cir. 1996); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D.Pa. 1996); *United States v. McMillan*, 946 F. Supp. 1254, 1270 (S.C.Miss. 1995); as well as in other contexts. *United States v. Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). The Eight Circuit in *United States v. Dinwiddie* upheld a national permanent injunction against an individual anti-abortion protestor. The court in *Dinwiddie* found that not only was there a significant governmental interest in protecting the particular clinic staff and patients involved in the case, but in protecting the staff and patients of other reproductive health facilities throughout the country from the illegal conduct of the defendant. *Dinwiddie*, 76 F.3d at 929. The court recognized that the defendant "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility." *Id.*, quoting the district court, 885 F. Supp. 1286, 1296 (W.D.Mo. 1995). Considering the evidence of defendants' illegal conduct across the United States, the reasoning of *Dinwiddie* applies squarely to this case.

D. Conduct versus Speech

The defendants argue that an injunction would be a direct ban on protected speech and thus would be unconstitutional. (Dfts' Memo in Opp. to Inj., pp. 7-8). However, the Supreme Court has held that there is a distinction between speech and conduct. While speech is constitutionally protected, if the speech is used to threaten, incite or organize criminal acts, the speech loses its protection. *Madsen*, 512 U.S. at 773 (threats

are proscribable under the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech infused with violence are indistinguishable from physical threats); *RAV v. City of St. Paul*, 505 U.S. 377, 383, 386 (1992) (fighting words are not protected by the First Amendment). See also, *United States v. Wilson*, 154 F.3d 658 (7th Cir. 1998) (an illegal course of conduct is not protected by the First Amendment merely because the conduct was carried out by speech).

The injunction restrains specific behavior of defendants that the courts have held are not protected: obstructing or interfering with the access to a reproductive health facility, *Schenck*, 519 U.S. at 367 n. 3; *Madsen*, 512 U.S. at 759-61; trespassing, *Id.*; *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 684 (9th Cir. 1998); *Roach*, 947 F. Supp. at 878; damaging property, *Portland Feminist*, 859 F.2d at 684; and using violence or threats of violence, *McMillan*, 946 F. Supp. at 1254. The Seventh Circuit has distinguished between conduct and speech in the arena of anti-abortion protesting: "[Physically impeding entry to a reproductive health facility] goes beyond protest and interferes with the personal liberty and property rights of others. While it is expressive conduct, it is not protected by the First Amendment." *Wilson*, 154 F.3d at 663. The injunction still leaves open many avenues for defendants to express their anti-abortion beliefs. For example, the injunction does not enjoin protected actions such as peaceful picketing, public speeches, pamphleteering, praying, or sidewalk counseling.[11]

E. Prior Restraint

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[11]See footnote 20, infra, for definition of sidewalk counseling.

The defendants argue that an injunction would be a prior restraint on speech, for it would have a chilling effect upon speech. (Dft's Memo in Opp. to Inj., p. 6). However, the Supreme Court has rejected this prior restraint argument in two cases involving injunctions against anti-abortion protestors. In *Madsen*, the Court held, "not all injunctions that may incidentally affect expression, however, are 'prior restraints' in the sense that the term was used in *New York Times Co.* [*v. United States*, 403 U.S. 713 (1971)] or *Vance* [*v. Universal Amusement Co.*, 445 U.S. 308 (1980)]. Here, petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the . . . buffer zone." 512 U.S. at 764, fn. 2. In *Schenck*, once again the Supreme Court rejected the prior restraint argument, for the injunction left alternative channels of communication open to protestors and the injunction was issued because of the illegal conduct of the defendants, not because of the content of their expression. 519 U.S. at 374, fn. 6. The same is true in this case. The record shows systematic illegal conduct by the defendants against the classes of plaintiffs. The injunction still allows a variety of options for the defendants to express their views. This case is about political means and ends. While the political ends of the defendants--to convince the public of the need to protect what they characterize as "unborn children"--are constitutionally protected by the First Amendment, a number of their means--destroying property and threatening violence--are not.

V. The Injunction

This case has come to the Court on the request of the

Certified Plaintiff Classes[12] and the members of NOW whom NOW represents for a Permanent Nationwide Injunction.

The Court having heard the evidence presented at the trial of this case from March 5, 1998 through April 14, 1998, after which a jury ruled in Plaintiffs' favor on all issues; and having heard additional evidence, without any advisory jury, from June 30, 1998 through July 2, 1998;

The Court hereby finds and orders:

1. The Defendants[13] have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., by operating an enterprise, the Pro Life Action Network ("PLAN"), through a pattern of numerous, repeated acts of racketeering that interfered with the Plaintiff Clinics' right to provide medical services, including but not limited to abortions, and the right of NOW members and the Plaintiff Class of women to obtain those services.

2. The evidence presented at trial established a likelihood that

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[12]The Plaintiff Class of Clinics and the Plaintiff Class of Women are defined in this Court's Order dated March 28, 1997 as follows:

> The Clinic Class: The class of all women's health centers in the United States at which abortions are performed.
>
> The NOW Non-Member Class: The class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities.

[13]Randall A. Terry entered into a Settlement Agreement with Plaintiffs prior to trial. This Order does not apply to him.

similar illegal conduct would be committed in the future by the Defendants and/or others acting in concert with them.

The Conduct Enjoined

3. Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, a/k/a Operation Rescue National (the "Defendants"), and each of their officers, directors, agents, representatives, servants, employees, attorneys and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly:[14]

a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (included but not limited to abortion services), by:

(1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;[15]

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[14]*Madsen v. Women's Health Center*, 512 U.S. 753, 775 (1994); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 687 (9th Cir. 1988); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3rd Cir. 1989).

[15]*Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 367 n.3 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 759-61 (1994).

(2) trespassing on the premises or the private property of any Plaintiff Clinic;[16]

(3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[17]

(4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[18]

b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others;[19] or

c. operating an enterprise through any of the Acts described above.

4. This injunction does not prohibit or preclude expressive activities that are constitutionally protected, including but not limited to the following conduct:

a. Peacefully carrying picket signs on the public property in

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[16]*Schenck*, 519 U.S. at 367 n.3 (1997); *Madsen*, 512 U.S. at 759 (1994); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 684 (9th Cir. 1988); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D.Penn. 1996).

[17]*Portland*, 859 F.2d at 684 (9th Cir. 1988).

[18]*United States v. McMillan*, 946 F. Supp. 1254 (S.C.Miss. 1995).

[19]*Schenck*, 519 U.S. at 367 n.3 (1997); *Madsen*, 512 U.S. at 761 (1994).

front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic[20];

d. Handing out literature on public property; and

e. Praying on public property.[21]

5. This injunction shall bind Defendants Joseph Scheidler; Andrew Scholberg; Timothy Murphy; the Pro-Life Action League, Inc.; and Operation Rescue, a/k/a Operation Rescue National, and each of their officers, agents, servants, employees and attorneys, and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN. Notice of this Order may be given to each such person by hand delivery, First Class Mail, Certified Mail, facsimile, or by reading a copy of this order aloud. Such reading may be accomplished by any representative of a Plaintiff Clinic or by any federal, state or local law enforcement personnel.

6. This injunction shall be enforceable by the U.S. Marshall Service and by any other federal, state or local law enforcement

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[20]This activity is also referred to as "sidewalk counseling." Sidewalk counseling has been defined by the Supreme Court as ". . . a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel. . ." *Schenck*, 519 U.S. 357 (1997).

[21]*Roach*, 947 F. Supp. at 878 (E.D.Penn. 1996).

authority, each of whom is hereby authorized to arrest any person who appears to be in disobedience of this injunction. The arrestee may be taken before any federal judge or magistrate in the jurisdiction in which the arrest is made. Violation of this injunction may subject the Defendant, or any person within the scope of this injunction, to prosecution for criminal or civil contempt of court, and to the imposition of any penalties available under the law, including but not limited to incarceration or detention, the posting of a bond, monetary penalties, payment of damages to any aggrieved persons or entities, payment of reasonable attorney's fees and costs in connection with a contempt action, and other sanctions deemed appropriate by the court.[22]

Retention of Jurisdiction

7. The Court shall retain jurisdiction to enforce the terms of this injunction for twelve (12) years from the date below.

Conclusion

For the foregoing reasons, Defendants Joseph Scheidler and Operation Rescue's motion for decertification of the two classes is DENIED. Plaintiffs National Organization for Women, Delaware Women's Health Clinic, and Summit Women's Health Clinic's motion to amend the complaint to conform to evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a

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[22] *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (referring to language of injunction quoted in 885 F. Supp. 1286, 1298 (W.D.Mo. 1995)); *Roach*, 947 F. Supp. at 878 (E.D.Penn. 1996).

permanent injunction to be placed upon defendants for a period of twelve (12) years. All other motions are denied as moot. This case is now closed.

Enter:

David H. Coar
United States District Judge

Dated: July 16, 1999

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge
or Magistrate Judge — David H. Coar

CASE NUMBER 86 C 7888 **DATE** August 5, 1999

CASE TITLE N.O.W., et al. vs. Scheidler, et al,

DOCKET ENTRY:

(10) ☒ [Other docket entry] As set forth on the reverse side of this Order, Scheidler defendants' motions 1) to Require the Identification of All Absent Clinic Members, to Release the Seal and Protective Order as to the Identity of the Clinic Class Members which Opted Out, and to Lift the Protective Order for Early Sessions of the Hill deposition is denied; 2) Motion to Defer the Issuance of any Rule 58 Money Judgment for Damages, Pending Stay of Injunction, Ruling on Post-Judgment Motions, the Determination of Any Appeal and Cross Appeal, and Filing of Any Fee Petition is denied; 3) Motion to Stay Enforcement of Injunction Order is denied; and 4) Defendant Operation Rescue's motion for Judgment as a Matter of Law or, Alternatively, for a new Trial is denied.

(11) ☒ [for further detail see
☒ order on the reverse of the original minute order form.]

ORDER

The following motions were ruled upon: 1) Scheidler Defendants' Motion to Require the Identification of All Absent Clinic Class Members, to Release the Seal and Protective Order as to the Identity of Clinic Class Members Which Opted Out, and To Lift the Protective Order for Early Sessions of the Hill Deposition is DENIED; 2) Scheidler Defendants' Motion to Defer the Issuance of Any Rule 58 Money Judgment for Damages, Pending Stay of Injunction, Ruling on Post-Judgment Motions, the Determination of Any Appeal and Cross-Appeal, and Filing of Any Fee Petition is DENIED; 3) Scheidler Defendants' Motion to Stay Enforcement of Injunction Order is DENIED; 4) Defendant Operation Rescue's Motion for Judgment as a Matter of Law or, Alternatively, for a New Trial is DENIED.

/s/ David H. Coar

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	
Plaintiffs,	**No. 86 C 7888**
v.	**Hon. David H. Coar**
JOSEPH M. SCHEIDLER, et al.	
Defendants.	

JUDGMENT IN A CIVIL CASE

This action came before the court for a trial by jury, and the issues having been duly tried and the jury having duly rendered its verdict, and the Court having ruled on the parties' post-trial motions in its Memorandum Opinion and Order dated July 16, 1999.

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered in favor of plaintiffs as follows:

1. Plaintiff Summit Women's Health Organization, Inc., have and recover from the defendants, Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League,

Inc., and Operation Rescue, jointly and severally, the sum of $163,413.84, the jury verdict of $54,471.28 trebled under RICO, with interest on this amount at the rate provided under 28 U.S.C. § 1961 from the date of this judgment until paid.

2. Plaintiff Delaware Women's Health Organization, Inc., have and recover from the defendants, Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, jointly and severally, the sum of $94,366.92, the jury verdict of $31,455.64 trebled under RICO, with interest on this amount at the rate provided under 28 U.S.C. § 1961 from the date of this judgment until paid.

3. Plaintiff National Organization for Women, Inc., have and recover from the defendants, Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, jointly and severally under RICO, attorneys fees and related nontaxable expenses. A determination of attorneys fees and related nontaxable expenses under RICO is deferred until further order of Court.

4. Plaintiffs are awarded their taxable costs pursuant to 28 U.S.C. § 1920; Plaintiffs shall file their bill of costs within thirty (30) days of the entry of this Judgment, consistent with Local Rule 45.

5. A permanent injunction is entered as follows:

a. Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, a/k/a Operation Rescue National (the "Defendants"), and each of their

officers, directors, agents, representatives, servants, employees, attorneys and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly;

i. interfering with the right of any member of the Certified Class of Plaintiff Clinics[1] to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women[2] to avail herself of the Plaintiff Clinics' services (including but not limited to abortion services) by:

(1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;

(2) trespassing on the premises or the private property of any Plaintiff Clinic;

(3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees,

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[1]The Plaintiff Class of Clinics is the class of all women's health centers in the United States at which abortions are performed.

[2]The Class of Women is the class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities.

volunteers, or any woman who seeks to use the services of such a Clinic;

(4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;

ii. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection (a) of this paragraph (the "Acts") through any of the Defendants or through others;

iii. operating an enterprise through any of the Acts described above.

b. This injunction does not prohibit or preclude expressive activities that are constitutionally protected, including but not limited to the following conduct:

i. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

ii. Making speeches on public property;

iii. Speaking to individuals approaching the clinic[3];

iv. Handing out literature on public property; and

v. Praying on public property.

c. This injunction shall bind Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life-Action League, Inc., and Operation Rescue, a/k/a Operation Rescue National (the "Defendants"), and each of their officers, agents, servants, employees, and attorneys, and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN. Notice of this Order may be given to each such person by hand delivery, First Class Mail, Certified Mail, facsimile, or by reading a copy of this order aloud. Such reading may be accomplished by any representative of a Plaintiff Clinic or by any federal, state or local law enforcement personnel.

d. This injunction shall be enforceable by the U.S. Marshall Service and by any other federal, state or local law enforcement authority, each of whom is hereby authorized to arrest any person who appears to be in disobedience of this injunction. The

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[3]This activity is also referred to as "sidewalk counseling." Sidewalk counseling has been defined by the Supreme Court as ". . . a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel. . ."

arrestee may be taken before any federal judge or magistrate in the jurisdiction in which the arrest is made. Violation of this injunction may subject the Defendant, or any person within the scope of this injunction, to prosecution for criminal or civil contempt of court, and to the imposition of any penalties available under the law, including but not limited to incarceration or detention, the posting of a bond, monetary penalties, payment of damages to any aggrieved persons or entities, payment of reasonable attorney's fees and costs in connection with a contempt action, and other sanctions deemed appropriate by the court.

6. The Court shall retain jurisdiction to enforce the terms of the above-described injunction for twelve (12) years.

/s/ David H. Coar

August 25, 1999
Dated

The Honorable David H. Coar
District Court Judge

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 86 C 7888

National Organization for Women, Inc., and its Women Members and Other Women Who Sue or May Use the Services of Women's Health Centers that Provide Abortions; Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on Behalf of Themselves and All Other Similarly Situated Clinics, Plaintiffs,

v.

Joseph M. Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, and Operation Rescue, Defendants.

March 28, 2001, Decided

March 28, 2001, Docketed

MEMORANDUM OPINION AND ORDER

Before this court is Joseph Scheidler's, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, and Operation Rescue's (collectively, "Defendants") motion for relief from the

judgment entered against them on August 27, 1999.[1] Defendants bring their motion pursuant to Federal Rule of Civil Procedure 60(b)(2) and (3). For the reasons discussed below, Defendants' motion is denied.

I. Background[2]

The National Organization for Women, Inc. ("NOW"), reproductive health clinics, and a class of potential women patients (collectively, "Plaintiffs") brought claims arising under § 1962 of the Racketeer Influenced and Corrupt Influences Act ("civil RICO") against Defendants. Plaintiffs alleged that Defendants, a coalition of anti-abortion groups, conspired to shut down abortion clinics through a pattern of racketeering activity. Plaintiffs asserted that Defendants conspired to use threatened or actual force, violence, or intimidation to induce clinic employees, doctors, and patients to give up their jobs and rights to obtain clinic services, and that the conspiracy harmed the clinics' business and property interests. During a trial lasting from March 4, 1998 through April 14, 1998, the jury heard

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[1]August 28, 2000, Defendants filed a motion for relief from judgment. In addition, they filed separately a supplemental Rule 60(b) motion. The court addresses these motions collectively.

[2]This background information is recounted in further detail in a previous opinion. *NOW v. Scheidler*, No. 86 C 7888, 1999 WL 571010 (N.D. Ill. July 28, 1999) (post-trial motions). Cites to the record, including the trial transcript, can also be found in that opinion. For procedural history, see generally, *NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) (scope of civil RICO); *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), *rev'd in* 510 U.S. 249 (1994); *NOW v. Scheidler*, 172 F.R.D. 351 (N.D. Ill. 1997) (class certification); *NOW v. Scheidler*, 1997 WL 610782 (N.D. Ill. Sep. 23, 1997) (summary judgment); *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995) (motion to dismiss).

evidence of anti-abortion protests that spanned from 1984 to 1998 orchestrated by Defendants.

The Pro-Life Action Network ("PLAN") and Operation Rescue ("OR"), led by Joseph Scheidler and other named defendants, coordinated a national anti-abortion movement. OR's stated purpose was to "overwhelm the law enforcement system and gain free access to the clinics without legal consequences." *NOW v. Scheidler*, 86 C 7888, 1999 WL 571010, at *3 (N.D. Ill. Jul. 28, 1999). Similarly, PLAN's founding members believed in aggressive tactics, including blocking clinic doors with their bodies in order to stop clinic patients and staff from entering the clinic. *Id.* Through the use of PLAN newsletters, speaking engagements, and conventions, PLAN leaders supported the use of illegal tactics, such as physically entering clinics and blocking procedure rooms, as a means to closing down health clinics that performed abortions. *Id.*

At trial, witnesses recounted the "fear and intimidation" they felt as a result of Defendants' actions. *Id.* at *2. In the July 28, 1999, memorandum opinion addressing various post-trial motions, this court highlighted the following incidents, among others, as illustrative of the tactics used by Defendants:

> In Milwaukee Wisconsin, protestors repeatedly banged on the car of a patient as she entered a health clinic parking lot, and grabbed at her arms and legs as she attempted to enter the clinic. "They surrounded me and my car. Telling me I wasn't a Christian, a baby killer. That I'm going to go to hell for this. Shoving pamphlets in my hand. Trying to stop me from making my way to the door of the building." The

patient was visiting the clinic to receive her pap smear results and to receive her contraceptive medication.

In Chico, California, a clinic administrator and two clinic escorts were physically smashed up against the entrance doors of a clinic by hundreds of protesters for four and a half hours. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout, "Don't pay attention to them. They're murderers. They're baby killer. Whatever happens to them is God's will." The glass entrance to the clinic was shattered and the clinic administrator received bruises on her legs and arms from the event.

Id. at *1, *2. In summarizing the evidence presented at trial, this court concluded that the jury heard evidence "tending to show that the objectives of the defendants at various protects included peaceful protest, informational picketing and leafleting, and acts of passive resistance in combination with intimidation (including violence and threats of violence) to stop abortions." *Id.* at *4.

The jury found that Defendants had engaged in 21 acts or threats involving extortion against patients, prospective patients, doctors, nurses, and/or clinic employees in violation of federal law, 25 such acts in violation of state law, and four acts or threats of physical violence to persons or property. Defendants also were found liable for monetary damages. On August 27, 1999, this court entered judgment in favor of Plaintiffs and entered a class-wide injunction against Defendants' unlawful racketeering activities. Defendants' appeal before the Seventh Circuit is still pending.

II. Discussion

Defendants urge this court to grant them relief from judgment pursuant to Rule 60(b)(2) and (3). In support of their motion, Defendants cite to three alleged factual inconsistencies. Specifically, Defendants claim: (1) that the glass door at the Chico clinic noted previously was loosened but not shattered; (2) that the assault in Milwaukee described above involved an individual not connected to PLAN, and contrary to testimony, occurred in 1986, and not 1985; and (3) that the testimony of an anonymous witness is unreliable and untrue.

Relief under Rule 60(b) is an extraordinary remedy that is granted only in exceptional circumstances. *Tobel v. City of Hammond*, 94 F.3d 360, 362 (7th Cir. 1996). *See also Publicis Communication v. True North Communications, Inc.*, 206 F.3d 725, 730 (7th Cir. 2000) (observing that a party "needs awfully good stuff to win a Rule 60(b)(2) motion"). Rule 60(b)(2) permits a court to revise a judgment because of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Rule 60(b)(3) provides a remedy for "fraud, misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3).

To obtain relief from judgment under Rule 60(b)(2), the movant must demonstrate: (1) that the evidence underlying the motion was discovered following trial; (2) that the movant exercised due diligence to discover the evidence; (3) that the evidence is not merely cumulative or impeaching; (4) that the evidence is material; and (5) that the evidence is such that it will likely produce a new result at a retrial. In the *Matter of*

Wildman, 859 F.2d 553, 558 (7th Cir. 1988); *West v. Love*, 776 F.2d 170, 176 (7th Cir. 1985). If any of these prerequisites is not satisfied, then the movant's motion must fail. 859 F.2d at 558.

Defendants' first contention is that the glass door at the Chico clinic was not shattered as noted in this court's prior memorandum opinion. Even if defendants are correct about the condition of the glass door, no relief is warranted under Rule 60(b)(2). Defendant's concede as much. In defendant OR's Response brief, they acknowledge that changing this court's prior memorandum opinion to reflect that the glass door was loosened rather than shattered "would not affect the jury verdict." OR Reply Br. at 2. It is also important to note that Defendants do not take issue with the remaining details articulated in the memorandum opinion regarding the threatening and physically aggressive nature of the protest at Chico. The error cited by Defendants is immaterial and insufficient to reopen judgment.

Defendants next challenge Susan Hill's ("Hill") testimony regarding the PLAN demonstration in Milwaukee. Hill, the chief operating officer of the National Organization for Women's Health Centers, testified that PLAN participants staged a protest at the Milwaukee Summit Women's Health Organization clinic in 1995. "There was pushing and shoving," Hill described, "and our administrator's husband had his arm broken in attempting to get into the building itself." Tr. at 676. Hill also stated that the protestors identified themselves as having come from a PLAN meeting in Appleton, Wisconsin.

Defendants claim that Hill erroneously identified the protest as having occurred in 1985 when it actually took place one year thereafter. Defendants also assert that the person who assaulted the clinic administrator's husband was a passerby who was unconnected to PLAN. Indeed, documents submitted by Defendants appear to support their claim that the clinic administrator's arm was broken by a passerby unconnected to PLAN.

Even taking Defendants' contentions as true, however, they provide an insufficient basis to overturn the jury verdict. Relief under Rules 60(b)(2) is available only within a year from the date judgment is entered. Defendants filed the instant motion within the one year period, albeit at the eleventh hour. But above and beyond this time requirement, motions under Rules 60(b)(2) are subject to a due diligence standard. *See Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986) ("The one-year period [set forth in Rule 60(b)] represents an extreme limit, and the motion will be rejected as untimely if not made within a reasonable time, even though the one year period has not expired.") Counsel's negligence is not grounds for Rule 60(b) relief. *See Tobel*, 94 F.3d at 362 (citing *Dickerson v. Bd. of Educ. of Ford Heights*, 32 F.3d 1114, 1118 (7th Cir. 1994)).

With due diligence, Defendants could have and should have discovered the evidence offered to support their claim in a more timely manner. The criminal complaint against the individual who broke the clinic administrator's husband's arm was filed on May 27, 1986, the state court decision reexamining the perpetrator's right to be examined for mental capacity was issued on June 30, 1987, and the editorial in a Milwaukee newspaper suggesting that the broken arm incident was not

caused by PLAN members was published on January 3, 1988. These public documents, available to Defendants nearly fifteen years ago, could have been used to impeach Hill during the 1998 trial. Rule 60(b)(2) provides relief from judgment where "newly discovered" evidence justifies such an extraordinary remedy. Here, defense counsel's failure to act in a timely manner precludes them from obtaining such relief.

Moreover, Defendants' attack on Hill's testimony does little to undermine the jury's verdict. During the eight week trial, the jury heard evidence of multiple incidents involving violence attributed to Defendants. Accordingly, the jury found that Defendants had engaged in four acts or threats of physical violence. In light of the multiple acts of violence ascribed to Defendants, their challenge to Hill's testimony does not demonstrate that the jury would likely reach a different verdict. *See United States v. Townsend*, 924 F.2d 1385, 1414 (7th Cir. 1991) ("It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance . . . that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.") (criminal case). Therefore, Defendants' refutation of Hill's testimony does not warrant relief under Rule 60(b).

Defendants do not fare better under Rule 60(b)(3). Pursuant to that rule, a judgment will be vacated if the movant shows by "clear and convincing evidence that the verdict was obtained through misconduct and that the misconduct was of such a nature that it prevented plaintiff from fully and fairly presenting his case." *West*, 776 F.2d at 176. *See also Lonsdorf v. Seefeldt*,

47 F.3d 893, 897 (7th Cir. 1995). Rule 60(b)(3) protects the integrity of judicial proceedings, not necessarily the correctness of the verdict. *Londsdorf*, 047 F.3d at 897. Thus, the alleged misrepresentation need not have altered the result of the case as a prerequisite to relief under Rule 60(b)(3). *Id.*

Defendants argue that Plaintiffs misrepresented the need to maintain the anonymity of the anonymous witness[3] when, at least according to Defendants, the same anonymous witness served as a class representative in an similar case in the Central District of California, *Nat'l Abortion Federation v. Operation Rescue*, CV 89-1181 ("NAF litigation"). Not only do Defendants question the anonymous witness's purported fear of reprisal and need for privacy, they also attack her credibility. Because Defendants raise this issue in a untimely fashion, however, the court need not speculate on whether Carolyn Thompson ("Thompson"), the class representative in the *NAF* litigation, is in fact the same person who testified anonymously in this action about being prevented her from obtaining post-operative care by the OR blockade in Los Angeles.

Defendants claim to have discovered the alleged identity between the NAF witness and NOW's anonymous witness when the Life Liberty Legal Defense Fund of California, who submitted an amicus brief on Defendant's behalf in the current appeal of this case to the Seventh Circuit, recognized that the broad outline of the NOW anonymous witness's trial testimony matched Thompson's verified averment in the initial and amended complaints filed in the *NAF* case. The amicus brief

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[3]It is important to note that both parties agreed on their own accord to allow this witness and others to testify anonymously.

that purportedly exposed the identity of these witnesses was filed on February 8, 2000.

Although Rule 60(b)(3) is not subject to a due diligence standard, Rule 60(b)(3) motions must be brought within a reasonable time. *Londsdorf*, 47 F.3d at 898. Defendants claim that, in February 2000, when the amicus brief was submitted, they identified Carolyn Thompson as the individual who testified anonymously in this case. Defendants, however, did not file the instant motion until August 28, 2000, despite having had their suspicions for nearly seven months. Defendants do not proffer an explanation for their delay. The delay is unreasonable.

In addition, Defendants have had in their possession all of the materials that ostensibly suggested the identity of the witness for well over a decade. During pre-trial discovery, Plaintiffs furnished Defendants with documents relating to the Los Angeles blockades. Not only did Plaintiffs produce the complaint filed on March 1, 1989, in the NAF case, including affidavits of Carolyn Thompson and others who had witnessed these blockades, but Defendants OR and Randall Terry were parties to the NAF litigation and presumably had access to the same documents. Defendants were also served with a summary of the anonymous witness's account, outlining the substance to which she would testify at the NOW trial. Moreover, Defendants interviewed the anonymous witness before her testimony. Armed with the NAF complaint and the pretrial documents in this case, Defendants not only could have questioned the anonymous witness before her testimony, but also used the documents to cross-examine the anonymous witness at trial. Therefore, Defendants were not prevented from

fully and fairly presenting their case. This court will not revisit the judgment entered against Defendants.

Defendants also contest the anonymous witness's credibility. The allegations contained in the NAF complaint together with Thompson's averments in her sworn declaration in that case are at odds with what she testified to before the jury in the instant case, Defendants maintain. Defendants also argue that despite the anonymous witness's claim of being subject to physical assault by OR protestors, there was no media coverage of such violence, thus undermining her account. Again, this evidence was available to Defendants well before the trial or shortly thereafter, rendering Defendants' challenge untimely.

In an attempt to impeach the anonymous witness's testimony, Defendants present some "new" evidence, but this evidence too does not warrant Rule 60(b) relief. Defendants reiterate arguments set forth in their prior Rule 60(b) motion, which this court denied on October 6, 1999, and the appeal of which is still pending. The court declines to rehash those same arguments. Furthermore, Defendants proffer affidavits of Thompson's neighbors who assert that she filed a frivolous sexual harassment suit, that she submitted false information on a bankruptcy petition, and that she informed them that she was paid for her testimony. The affidavits are offered solely for the purpose of impeaching the anonymous witness. As such, they do not merit relief under Rule 60(b)(2). *Wildman*, 859 F.2d at 558 (requiring movant to show that evidence is not merely cumulative or impeaching).

Additionally, the new evidence proffered by Defendants cannot serve as a basis for Rule 60(b) relief because they raise

collateral matters. Rule 608(b) of the Federal Rules of Evidence provides that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence." Fed. R. Evid. 608(3). *See also Taylor v. Nat'l R.R. Passenger Corp.*, 920 F.2d 1372, 1375 (7th Cir. 1990) (stating that "a witness may not be impeached by contradiction as to collateral or irrelevant matters elicited on cross- examination"). Defendants invite the court to delve into whether or not Thompson, who may or may not be the anonymous witness in the instant case, lied about a sexual harassment case and withheld assets from her bankruptcy petition. Clearly, these are the extrinsic, collateral matters prohibited by F.R.E. 608(b). Where materials are inadmissible under the rules of evidence, they cannot support Rule 60(b) relief. *United States v. McGaughey*, 977 F.2d 1067, 1075 (7th Cir. 1992). Defendants' Rule 60(b) motion is denied.

In the alternative to Rule 60(b) relief, defendants request limited discovery and an evidentiary hearing to address further the issues presented. This request is denied.

III. Conclusion

For the foregoing reasons, Defendants' Rule 60(b) motion for relief from judgment is denied.

Enter:

David H. Coar
United States District Judge
Dated: March 28, 2001

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INCORPORATED, and SUMMIT WOMEN'S HEALTH ORGANIZATION, INCORPORATED,
Plaintiffs-Appellees,

v.

JOSEPH M. SCHEIDLER, PRO-LIFE ACTION LEAGUE, INCORPORATED, ANDREW D. SCHOLBERG, OPERATION RESCUE, et al,
Defendants-Appellants.

May 18, 2001

ORDER

On consideration of the "PLAINTIFFS-APPELLEES' MOTION TO CONSOLIDATE RELATED APPEALS" filed on May 15, 2001,

IT IS ORDERED that the motion is GRANTED, and these appeals are CONSOLIDATED for purposes of disposition.

Briefing in 01-2050 is SUSPENDED at this time. The court will determine at a later date whether briefing will be necessary in 01-2050.

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 99-3076, et al.

NATIONAL ORGANIZATION FOR WOMEN, INC., etc., et al., Plaintiffs-Appellees,

v.

JOSEPH M. SCHEIDLER, et al., Defendants-Appellants.

October 29, 2001, Decided

NOTICE:

RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Before Hon. ILANA DIAMOND ROVNER, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

On consideration of the petitions for rehearing and rehearing *en banc* filed by Counsel for Defendants-Appellants Scheidler, Scholberg, Murphy & Pro-Life Action League, Inc., and

Counsel for Defendant-Appellant Operation Rescue, all members of the original panel have voted to **DENY** the petitions for rehearing. No judge* in regular, active service requested a vote on rehearing *en banc*.

Accordingly,

IT IS ORDERED that the petitions for rehearing be, and the same are hereby, **DENIED**.

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*Judge Kenneth F. Ripple did not participate in the consideration of these petitions.

APPENDIX M

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

APPENDIX N

Hobbs Act

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened

force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 1951

APPENDIX O

RICO [excerpts]

§ 1961. Definitions

As used in this chapter --

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section

1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire),

sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign

Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of

the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1961

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1964 [prior to 1995 amendment]

APPENDIX P

86 C 7888 N.O.W. et al v. Scheidler, et al

SPECIAL INTERROGATORIES AND VERDICT FORM

We, the jury in this action, unanimously find as follows:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

   Yes ✓ No ___

2. Were the following Defendants associated with PLAN? (See Jury Instruction No. 20 for the definition of "associated with")

Joseph Scheidler	Yes ✓	No ___
Andrew Scholberg	Yes ✓	No ___
Timothy Murphy	Yes ✓	No ___
Pro-Life Action League	Yes ✓	No ___
Operation Rescue	Yes ✓	No ___

3. Did the following Defendants participate in the operation or management of PLAN? (see Jury Instruction No. 21 for a definition of participation in operation or management)

Joseph Scheidler	Yes ✓	No ___
Andrew Scholberg	Yes ✓	No ___
Timothy Murphy	Yes ✓	No ___
Pro-Life Action League	Yes ✓	No ___
Operation Rescue	Yes ✓	No ___

4. Did any Defendant, or any other person associated with PLAN, commit any of the following acts?:

		Yes	Number of Acts	No
(a)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of federal law	✓	21	
(b)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of the law of any state	✓	25	
(c)	Threats of murder against a doctor, nurse, or clinic employee		0	✓

(d)	Attempt or conspiracy to do any of the acts listed above, even if the act was not actually carried out	✓	25	
(e)	Acts or threats of physical violence to any person or property	✓	4	
(f)	Travel across state lines, or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law	✓	23	
(g)	Attempt to do an act described in (f) above, even if the act was not actually carried out	✓	23	
(h)	Causing another person to do an act described in (f) above		0	✓

5. Were at least two (2) of these acts committed during any ten-year period?

   Yes ✓ No ___

6. If you answered "yes" to any item of 4(a) or 4(b), was your answer based solely on blockades of clinic doors or sit-ins within clinics, without more?

Yes ___ No ✓

7. Did PLAN or persons associated with PLAN engage in a "pattern" or at least two of the acts that you found in Question 4 above? (see Jury Instruction No. 28 for the definition of "associated with")

Yes ✓ No ___

8. Did any of the acts that you found in Question 4 above affect interstate commerce? (see Jury Instruction No. 19 for the definition of interstate commerce)

Yes ✓ No ___

9. If any defendant or any person associated with PLAN committed any two (2) acts described or listed above in question number 4 within any 10 year period, did those acts proximately cause injury to the business or property of the following plaintiffs? (see Jury Instruction No. 28 for the definition of proximate cause)

The women represented by NOW:

Yes ✓ No ___

Delaware Women's Health Organization:

Yes ✓ No ___

Summit Women's Health Organization:

Yes ✓ No ___

If you answered "yes" to Questions 1, 5, 7 and 8, and if you found that at least two acts were committed in Question 4, and if you answered "yes" as to any Defendant(s) in Questions 2 and 3, you have found those Defendant(s) liable on Claim I, and you should proceed to the next question:

10. As to the Defendants whom you have found liable on Claim I. what amount will adequate compensate these Plaintiffs for their RICO injuries?

    Summit Women's Health Organization $54,471.28

    Delaware Women's Health Organization $31,455.64

If you found all of the defendants liable on Claim I, you need not proceed any further; simply go to the last page and sign and date the Verdict Form.

If you did not find all of the Defendants liable on Claim I, you should answer the following questions as to Claim II for any such Defendant(s):

11. Did the following Defendants combine or agree with one another or with others to operate PLAN through a pattern of acts illegal under RICO?

    Joseph Scheidler Yes ___ No ___

    Andrew Scholberg Yes ___ No ___

Timothy Murphy	Yes ___	No ___
Pro-Life Action League	Yes ___	No ___
Operation Rescue	Yes ___	No ___

12. As to the Defendant or Defendants whom you have found liable on Claim II. what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization	$_____
Delaware Women's Health Organization	$_____

Please now sign and date the verdict form and tell the bailiff you have reached a verdict.

4-20-98	*/s/ Amandis Rott*
Date	Foreperson
/s/ Sheila L. Lark	*/s/ Patricia L. Mitchell*
Juror	Juror
/s/ Kats Nakashima	*/s/ Patricia L. Ostrander*
Juror	Juror
/s/ Julie Martin	_____
Juror	Juror
_____	_____
Juror	Juror

_____	_____
Juror	Juror
_____	
Juror	